American Bar Association

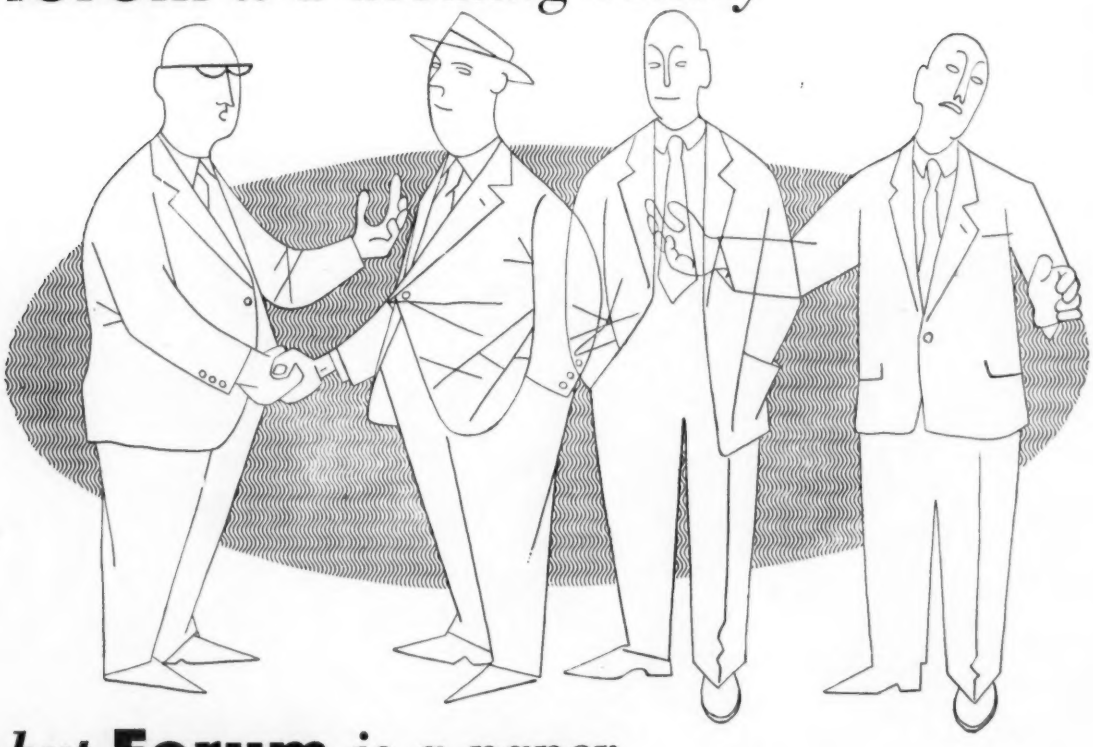
Journal

May 1954

Law

Annual Meeting and Dedication of American Bar Center
Chicago, August 16-20

forum *is a debating society*



but **Forum** *is a paper*

Sometimes it's hard to tell whether the forum uses the Forum as a source of authority, or the other way around.

You'd certainly have trouble figuring it out if it weren't for the capital "F." That big initial tells you that the Forum is a newspaper. When you know that much, at least the problem is clear.

Here's another one that's easy to understand: the problem of protecting a trade-mark when you own one. You see, the word "Coke" is a trade-mark, the property of The Coca-Cola Company. Good usage demands that we take active steps to protect our trade-mark by seeing that it is properly used whenever it appears.

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Contents

MAY, 1954

THE AMERICAN BAR ASSOCIATION JOURNAL is published monthly by the AMERICAN BAR ASSOCIATION at 1140 North Dearborn Street, Chicago 10, Illinois.
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The President's Page

William J. Jameson

[redacted]

■ I appreciate the communications I have received with respect to my declining to serve as special counsel for the Senate Investigating Subcommittee in the public telecast hearing of the controversy between persons connected with the committee and the Army. The communications from members of the Association indicate overwhelming support of our action. A few lawyers, editors and laymen have been critical of my decision and that of the Board of Governors. Some of these letters, because of bias for one side or the other of the controversy, confirm the wisdom of our decision. Others are sincere and well-considered statements of reasons for accepting the assignment, and I have welcomed the opportunity of presenting in more detail the reasons for our decision.

When the Senate committee requested me to serve as special counsel, I communicated at once with the Board of Governors as well as with chairmen of certain Committees which might be concerned with the problem. The request was given careful consideration. The Association is always desirous of co-operating with congressional committees and anxious to render public service. The decision in this case was not easy.

The request was treated in confidence, and no public statement was made until after the subcommittee announced publicly that I had been requested to serve and had declined and my reasons for doing so. At the request of various news services, I then made the following statement:

> I appreciate the confidence of the members of the Senate committee and regret my inability to accept the appointment as special counsel. The majority of the Board of Governors of the American Bar Association reached the conclusion, in which I concur, that my acceptance would be inadvisable; first because speaking engagements and other commitments on behalf of the Association will require all of my time between now and the Annual Meeting in August; and second by reason of possible political implications in the controversy, it was questionable whether I should accept while serving as President of the Association.
>
> All of us recognize the importance of the assignment, and the opportunity for public service. Were it not for my present commitments, and the fact that I am now acting in an official capacity for the American Bar Association, I would not hesitate to accept the appointment.

Did these reasons justify our decision that as President of the American Bar Association I should not serve as special counsel?

In appraising our conclusion, consideration should be given to the nature of the controversy. This was expressed by Senator Mundt in his statement of March 27, in part as follows:

> Involved here at worst are misconduct and misrepresentation by one or more individuals connected with the Army or the Senate committee or both but, unless perjury is subsequently committed in sworn testimony before our committee, no crime punishable by law is now charged or indicated.
>
> Involved here at best are misunderstandings and mistakes by one or more individuals connected with the Army or the Senate committee, or both, which have interfered with the orderly work of a growing number of officials both in the Army and in Congress.

Senator Mundt suggested also in his statement that no one could, of course, predict what ramifications might develop. As of now apparently there is involved primarily the question of the veracity of certain individuals. The result might be a complete vindication of one group or the other, or it might be inconclusive.

It was estimated that from two to four weeks would be required for the hearing. Conceivably, this could be protracted for a longer period.

It is apparent that many who have written me are not aware of the fact that the President of the Association devotes all of his time during the year of his incumbency to the many activities of the organized Bar. His duties are not limited to speaking engagements before state and local bar associations but include many administrative functions and are concerned with many activities devoted to the public interest. The Association does not have a vice president and at present does not have a director of activities, and acceptance of the assignment would of necessity have resulted in neglecting the work of the Association. The decision was not predicated upon any lack of appreciation of the importance of the assignment but rather on the fact that there were many other lawyers who were at least as well qualified and who had not assumed the responsibilities devolving upon the President of the Association.

I do not presume anyone would deny that there are political implications in the controversy. This is confirmed by letters from bitter partisans on both sides which assume in advance that any investigation

will vindicate one side or the other. For example, I received one wire reading, "Legal cowards die many times before their death; the valiant like McCarthy never taste of death but once", and another communication reading, "What fools ye mortals be who won't stand up for the *one* man who is trying to save our country." On the other hand, another letter regrets that we have "ducked the opportunity of investigating and maybe exposing *the* evil of our day—McCarthyism"; and still another in a bitter denunciation of Senator McCarthy urges "the Association to do everything possible to achieve the expulsion of McCarthy from our United States Senate".

The membership of the Association embraces lawyers of all shades of political opinion. The Association, however, is traditionally nonpartisan. While it frequently takes positions on controversial public questions through the policy-making mechanism of its House of Delegates, made up of representatives of various components of the legal profession, its officers endeavor to avoid the involvement of the Association in controversies of a political nature. Recognizing fully that there may be differences of opinion, it was the conclusion of the Board of Governors that this was the type of controversy in which the Association officially should not be involved, even though any individual lawyer might properly undertake the investigation.

In other words, the President of the Association did not decline to serve because the assignment involved a controversy or might invite criticism, but because of his other commitments and the political aspects of the controversy. Some letters and editorial comments have argued that in the case of the Bricker Amendment the Association took a stand on a controversial issue. This is true. There are, however, two basic distinctions: (1) The Bricker Amendment involves fundamental questions of constitutional law, and (2) the action was taken not by the President and the Board of Governors but by the House of Delegates after a full discussion of both sides of the question.

The Association today, through a Special Committee, is making an objective study of procedures in congressional investigations. This is a controversial subject, and our study has received some criticism. This study, however, is under way and is taking several months of careful research. I believe that the Association, through the careful research of this committee, can make a more constructive contribution in the field of congressional investigations than could be made by participation of the President of the Association in the present controversy. The nature of the study of the committee was set forth in a progress report before the House of Delegates at its recent meeting in Atlanta as follows:

> Various bar associations, other organizations, and members of Congress have already made proposals for changes in procedures. The committee feels that its assignment requires it to consider all such proposals and also to study records of committee proceedings which reflect actual practice and might suggest areas for attention. It has recognized that the study should be a broad one, since the committee is concerned with a whole area of governmental activity where there are now no general rules of law. It is not concerned merely with proceedings or practices of particular committees or with investigations which are now in the public eye. The problem of the need for procedural reform is obviously general and affects investigations of business, organizations, government, and individuals. Any proposed reforms must take into account the proper balance between preserving the essential investigative function and the protection of individual rights. It almost goes without saying that this balance can be maintained without blocking investigations of Communism or any other proper subject.
>
> From the outset, the committee agreed that its research must be conducted with complete objectivity and with the purpose of arriving at conclusions which would appeal to most lawyers, members of Congress, and of the public. Recognition of the need for some general rules in this field is sufficiently widespread so that it was hoped that the Association might make a major contribution here as it did some years ago when general rules affecting administrative agencies were devised by cooperation between the Congress and the Association.

Unfortunately, one news report conveyed the false impression that my initial reaction to the request from the Senate committee was that I didn't want to be "bothered". This simply is not true. I made no such statement. On the contrary, I fully appreciated the evidence of confidence in the Association which the request implied, and it was given the most careful consideration both by me and by the other members of the Board of Governors.

Nominating Petitions

Illinois

■ The undersigned hereby nominate Charles A. Bane, of Chicago, for the office of State Delegate for and from the State of Illinois to be elected in 1954 for a three-year term beginning at the adjournment of the 1954 Annual Meeting:

Vernon M. Welsh, Thomas M. Thomas, Norbert S. Jacker, Joseph H. Pleck, Thomas F. Scully, Karl F. Nygren, Andrew C. Hamilton, Don H. Reuben, Dwight P. Green, Hammond E. Chaffetz, Carl S. Lloyd, J. B. Martineau, Jr., Walter E. Tinsley, J. B. Cleaver, W. H. Van Oosterhout, Thomas B. Martineau, Jules L. Brady, Bernard M. Epstein, Theodore Stone, Augustine J. Bowe, Karl Edwin Seyfarth, Douglass Pillinger, Howard D. Moses, Adalbert J. Kirschten and Nathan J. Kaplan, of Chicago.

Iowa

■ The undersigned hereby nominate Frederic M. Miller, of Des Moines, for the office of State Delegate for and from the State of Iowa for a three-year term beginning at the adjournment of the 1954 Annual Meeting:

V. C. Shuttleworth, of Cedar Rapids:

Robert Valentine, of Centerville;

Charles D. Waterman, of Davenport;

Howard Steele, Llewellyn E. Slade, Gregory Brunk, Robert E. Dreher, A. L. Wensel, Peter W. Janss, M. O. Riepe, A. B. Howland, B. A. Webster, Jr., John Gamble, Robert J. Bannister, Alex M. Miller, Irving W. Myers, Gibson C. Holliday, James G. McDowell, Jr., Hiram S. Hunn, W. Z. Proctor, Homer E. Bradshaw, Paul W. Steward, Thomas B. Roberts, Harlan J. Thoma and Louis A. Parker, of Des Moines.

Maine

■ The undersigned hereby nominate David A. Nichols, of Camden, for the office of State Delegate for and from the State of Maine to be elected for a three-year term beginning at the adjournment of the 1954 Annual Meeting:

James L. Reid, of Augusta;

Merrill R. Bradford, Arnold L. Veague and Edwin F. Stetson, of Bangor;

Ralph C. Masterman, of Bar Harbor;

Lynn M. Bussey, of Bath;

Hubert W. Townsend, of Belfast;

Thomas B. Walker, Harold D. Carroll and Hilary F. Mahaney, of Biddeford;

James Blenn Perkins, Jr., of Boothbay Harbor;

Elbridge B. Davis, of Calais;

W. Atherton Fuller, Jr., of Ellsworth;

Frederick P. O'Connell, of Kennebunk and Augusta;

W. Paul Quarrington, of North Berwick;

Scott W. Scully, Vincent L. McKusick, Sigrid E. Tompkins and Nathaniel M. Haskell, of Portland;

Samuel W. Collins, Jr., and Christy C. Adams, of Rockland;

Charles W. Smith and Mary A. Bradbury, of Saco;

George B. Lauriat, of Southwest Harbor;

Richard J. Dubord, of Waterville.

Washington

■ The undersigned hereby nominate Thomas Todd, of Seattle, for the office of State Delegate for and from the State of Washington to be elected for a three-year term beginning at the adjournment of the 1954 Annual Meeting:

Brockman Adams, Kenneth A. Cox, Griffith Way, F. A. LeSourd, Walter Kane Scott, E. E. McInnis, Jr., Richard C. Solibakke, Herbert Little, Serge S. Gorny, Warren R. Slemmons, C. Calvert Knudsen, J. Tyler Hull, M. Bayard Crutcher, Walter B. Williams, Robert W. Graham, Max Kaminoff, Edward S. Franklin, Donald A. Schmechel, Arthur E. Simon, Willard J. Wright, James D. Rolfe, Charles H. Todd, William F. Devin, Clarence H. Campbell and Irving Clark, Jr., of Seattle.

Mississippi

■ The undersigned hereby nominate John C. Satterfield, of Jackson, for the office of State Delegate for and from the State of Mississippi to be elected in 1954 for a three-year term beginning at the adjournment of the 1954 Annual Meeting:

Mike L. Carr, Jr., R. L. Jones, Hugh V. Wall, R. Pearce Phillips and Tom P. Brady, of Brookhaven;

Russel D. Moore, III, W. C. Wells, III, Earl T. Thomas, Erskine W. Wells, W. C. Wells, Jr., Milton H. Mitchell, Junior O'Mara, C. B. Snow, Joe H. Daniel, J. Will Young and John M. Kuykendall, Jr., of Jackson;

Gibson B. Witherspoon, A. S. Bozeman, Sr., A. S. Bozeman, Jr., and John D. Ready, Jr., of Meridian;

Fielding L. Wright, Jr., of Rolling Fork;

W. A. Henry, Herman B. DeCell, Allen Bridgforth and W. H. Barbour, of Yazoo City.

Puerto Rico

■ The undersigned hereby nominate Francisco Ponsa Feliú, of San Juan, for the office of State Delegate for and from Puerto Rico to be elected for a three-year term beginning at the adjournment of the 1954 Annual Meeting:

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American Bar Association Journal

the official organ of the

AMERICAN BAR ASSOCIATION

published monthly

The objects of the American Bar Association, a voluntary association of lawyers of the United States, are to uphold and defend the Constitution of the United States and maintain representative government; to advance the science of jurisprudence; to promote the administration of justice and the uniformity of legislation and of judicial decisions throughout the nation; to uphold the honor of the profession of law; to apply its knowledge and experience in the field of the law to the promotion of the public good; to encourage cordial intercourse among the members of the American Bar; and to correlate and promote such activities of the Bar organizations in the nation and in the respective states as are within these objects, in the interest of the legal profession and of the public. Through representation of state, territory and local bar associations in the House of Delegates of the Association, as well as large membership from the Bar of each state and territory, the Association endeavors to reflect, so far as possible, the objectives of the organized Bar of the United States.

There are seventeen Sections for carrying on the work of the Association, each within the jurisdiction defined by its by-laws, as follows: Administrative Law; Antitrust Law; Bar Activities; Corporation, Banking and Business Law; Criminal Law; Insurance Law; International and Comparative Law; Judicial Administration; Labor Relations Law; Legal Education and Admissions to the Bar; Mineral Law; Municipal Law; Patent, Trade-Mark and Copyright Law; Public Utility Law; Real Property, Probate and Trust Law; Taxation; and the Junior Bar Conference. Some issue special publications in their respective fields. Membership in the Junior Bar Conference is limited to members of the Association under the age of 36, who are automatically enrolled therein upon their election to membership in the Association. All members of the Association are eligible for membership in any of the other Sections.

Any person who is a member in good standing of the Bar of any state or territory of the United States, or of any of the territorial groups, or of any federal, state or territorial court of record, is eligible to membership in the Association on endorsement, nomination and election. Applications for membership require the endorsement of a member of the Association in good standing and are considered in each case by a Committee on Admissions of the appropriate state. If the applicant is a member of the Bar of the state or territory in which he resides or has his principal office, or is a member of a federal, state or territorial court of record of a state or territory in which he resides or has his principal office, the application is referred to the Committee on Admissions for one of such states or territories. If, however, the applicant is not a member of the Bar of the state or territory in which he resides or has his principal office, the application is referred to the Committee on Admissions for one of those states or territories or is referred to the Committee on Admissions for a state or territory in which the applicant formerly resided and to the Bar of which he was admitted. Upon the approval of an application by a majority of the proper Committee on Admissions, an applicant is deemed nominated for membership. All nominations made pursuant to these provisions are reported to the Board of Governors for election. Four negative votes in the Board of Governors prevent an applicant's election.

Dues are $16.00 a year, except for the first two years after an applicant's admission to the Bar, the dues are $4.00 per year, and for three years thereafter $8.00 per year, each of which includes the subscription price of the JOURNAL. There are no additional dues for memberhip in the following Sections: Bar Activities, Criminal Law, Judicial Administration, Legal Education and Admissions to the Bar, and the Junior Bar Conference. Dues for the Section of Administrative Law, the Section of Antitrust Law, the Section of Labor Relations Law and the Section of Patent, Trade-Mark and Copyright Law are $5.00 a year; dues for the Section of Taxation are $6.00 a year; dues for all other Sections are $3.00 a year.

Blank forms of proposal for membership may be obtained from the Association offices at 1140 North Dearborn Street, Chicago 10, Illinois.

American Bar Association

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Board of Editors, American Bar Association Journal, listed on page 400

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Views of Our Readers

■ Members of our Association are invited to submit short communications expressing their opinions, or giving information, as to any matter appearing in the *Journal* or otherwise within the province of our Association. Statements which do not exceed 300 words will be most suitable. The Board of Editors reserves the selection of communications which it will publish and may reject because of length. The Board is not responsible for matters stated or views expressed in any communication.

Lawyers and the Fifth Amendment

■ Hurrah for your editorial on "Lawyers and the Fifth Amendment". It is heartening to have someone like you speak forthrightly about those who use the Fifth Amendment as a shield. It seems to me that the same principle applies to other groups in national affairs.

EUGENE P. WALSH

New York, New York

Likes the Editorial on the Fifth Amendment

■ Allow me to compliment you upon the accuracy and vigor of the editorial in the December number of the JOURNAL entitled "Lawyers and the Fifth Amendment".

KIMBROUGH STONE

United States Court of Appeals
Eighth Circuit
Kansas City, Missouri

The "Divine Right of Delegates"?

■ As a new member of the American Bar Association I was appalled to read the letter to the Editor of Louis E. Wyman appearing in the January, 1954, issue.

So the lawyers themselves should not vote on a major constitutional change like the Bricker Amendment, which they are incapable of having intelligent opinions about, but should leave it to the House of Delegates to make up their minds and speak for them?

It might surprise Mr. Wyman and those who share his viewpoint to learn that many American lawyers who are interested primarily in local matters also have opinions on constitutional and political questions about which the House of Delegates purports to speak for all lawyers.

Two examples in Michigan are in point:

1. A mail referendum last year showed that the members of the Michigan Bar were in favor of Social Security coverage for lawyers by better than two to one, although the American Bar Association opposed this coverage.

2. The Michigan State Bar Convention held in Detroit September 24, 1953, overwhelmingly supported my resolution *opposing* a 25 per cent federal tax limitation amendment, although the American Bar Association has supported the Amendment, lining up with those who seek to accomplish a legislative result by this back-handed means.

A resolution opposing the Bricker Amendment is now under study by the Michigan Bar's Committee on International and Comparative Law.

As a professional association, I am convinced that the American Bar Association can contribute much to American lawyers. I fail to see where it has any basis in the political arena, poking its nose into controversial questions except where it is clearly expressing the will of the majority of American lawyers.

Until I read Mr. Wyman's letter, I had assumed that the members of the House of Delegates must have thought they were reflecting the prevailing viewpoint of American lawyers in making their pronouncements.

Now that my naïveté has been eliminated, I might suggest that the "divine right of delegates" philosophy espoused by Mr. Wyman may well be a major reason why the bulk of American lawyers have not joined the American Bar Association.

THOMAS C. WALSH

Lansing, Michigan

Wants To Know More About Jenkins-Keogh Bills

■ I have read, with a great deal of interest, the article appearing on page 42 of the January issue of the JOURNAL, by Mr. Allen L. Oliver, Cape Girardeau, Missouri.

I do not know a great deal about H.R. 10 and H.R. 11, known as the Jenkins-Keogh bills, pending in the Congress, and I am certain that 95 per cent of the American lawyers know nothing about these proposed bills. I, therefore, suggest to you that you have a full and complete article in the next issue, or in some future issue of the JOURNAL.

JOHN C. HOYO

San Antonio, Texas

Calls Social Security a "Robin Hood"

■ Here is another comment on the Dean Larson article on social security and self-employed lawyers.

I agree that this law, as it now exists, is unconstitutional. It is purely class legislation granting special privileges to one class without regard to necessity therefor and imposing on another class the financial burdens thereof without regard for their ability to pay therefor. It is a "Robin Hood" raid under the guise of paternal legislation.

As originally enacted I am satisfied that general welfare was a minor consideration for this law, that its primary purposes were to increase revenue and weld labor into a voting bloc. It is plainly a "clear it with Sidney" deal and its effect comes as nearly as possible to providing that

(Continued on page 364)

(*Continued from page 362*)

those who benefit are limited to members of a labor union.

I cannot agree that this law should be repealed. It is so deeply rooted into our economy that such a drastic step would result in upheavals of the first magnitude, both economic and political.

Your correspondent does not make it plain whether or not he includes in his comment the unemployment compensation phase of this law. I will not go into the facts in support of my conclusions as they are well known to all of us. A man can earn a million in the first few months of a year and then draw compensation for six months. This law has no place in our economic system, it encourages indolence and discourages thrift and as it now operates it is used by labor unions to spread work. If it is to be retained it should provide for compensation only after the applicant has not received a living wage during twelve months prior to his application.

I think that those who are able to do so should provide their own old-age retirement fund. I also think that those who are to benefit from old age retirement should pay the entire cost instead of half and that the remaining population should not be called on to pay the other half plus administration and deficits. With such a system in effect it should be optional for a person to enter the system if he has net assets sufficient to support himself and wife during their life expectancies and, having entered, it should be provided that one can withdraw who has acquired such net assets and be paid the amount of his contributions plus interest.

I think a survey should be made of present administrative costs of the present system with a view to placing this insurance with private insurers in case it develops that it can be administered by them at less expense than by government.

M. M. PIXLEY

Seattle, Washington

Social Security and the Trojan Horse

■ Hooray for George E. Morton and his article in the JOURNAL for February entitled "Social Security: The Trojan Horse Inside Our Walls" wherein he described our predecessors as being men who "had the courage to make *and be satisfied* with the security they made for themselves individually".

I was afraid that after twenty years of the emasculating Republican doctrine, that the government was established to take care of the people, perpetrated on us by a Democratic administration, there were none like Mr. Morton left. Thank God for him. May his tribe increase!

J. EDWARD THORNTON

Mobile, Alabama

Confusion in the Courts

■ Thank you very much for printing Mr. Crouch's article, "The Inventor in the Courts: Confusion as a Standard for Invention", which appeared in the February, 1954, issue of the AMERICAN BAR ASSOCIATION JOURNAL. The article is a most constructive criticism of the futility of judges deciding matters which they do not understand. My late partner, Edward S. Rogers, penned these words in protest to small minds dealing with large questions, which are quite appropriate to judges ruling on questions on which they have, to say the least, only a superficial knowledge:

> One longs for Good King George's
> glorious days,
> When noble statesmen did not itch
> To interfere in matters which
> They did not understand.

In this office, we specialize in trademarks and unfair competition litigation. Not long ago, we spent, in vain, a great deal of time and effort in the preparation for, and the trial of a trade-mark case. We proved actual confusion and likelihood of confusion. We made and introduced as evidence extensive surveys showing the public's reaction to the article sold under the infringing mark. Yet, all this evidence was brushed aside and disregarded by the court who decided that the infringer was "entitled to warm itself into being in the sunlight of the plaintiff's reputation", which Judge Coxe, in *Clark Thread Co.* v. *Armitage*, 67 Fed. 896, said that the defendant had no right to do.

I once asked a lawyer who was a former clerk to one of the Supreme Court Justices why it was that in recent years the Supreme Court refused to grant certiorari in trade-mark cases. He said, "Oh, well, a petition for certiorari in a trade-mark case has two strikes called against it when it reaches the Court. The Justices, when told that the petition involves a trade-mark, merely smile."

Mr. Justice Holmes, in *Bourjois* v. *Katzel*, 260 U.S. 689, in speaking of the value of a trade-mark, said: "It deals with a delicate matter that may be of great value but that easily is destroyed, and therefore should be protected with corresponding care." It is too bad that the present members of the Supreme Court do not have the understanding of the value of trade-marks and patents that Mr. Justice Holmes had. They do not seem to realize that patents and trade-marks, especially trade-marks, are in many cases the most valuable asset a corporation has. They refuse to review a tort action where a valuable trade-mark is being infringed and damaged and to uphold the validity of a patent that is invaluable. Yet, they will review a tort action involving trespassing across a vacant lot; they understand that sort of a trespass. They will review and set aside the conviction of a Negro in the South convicted of rape or murder, even where there is no doubt about his guilt, because there were not a proportionate number of names of Negroes in the jury box as compared to white persons, but they refuse to protect valuable industrial property in trade-marks and patents.

I have, for years, advocated a court of final resort for patent and trade-

(*Continued on page 366*)

Views of Our Readers

(Continued from page 364)

mark cases, consisting of judges who are specialists in this branch of the law, where litigants could be heard on appeals from decisions of the various courts of appeals as a matter of right. Virtually the court of last resort now in patent and trade-mark actions, especially in trade-mark cases, is the Court of Appeals. It is a waste of time and money to file a petition for certiorari.

It would be wonderful to have a court of final resort in trade-marks and patent cases composed of judges like Judge Florence Allen of the 6th Circuit, and Judge Barnes of the Northern District of Illinois, who know patent and trade-mark law and who are familiar with the subject matter.

It has been said, by some short-sighted person that does not realize that the industrial progress of the nation is largely due to patents, that the Supreme Court has saved the public from the patent system. I say that something must now be done to save the patent and trade-mark systems from the Supreme Court. My solution is the founding of a new court of final resort in patent and trade-mark cases.

Mr. Crouch's article is so forthright and makes so much good sense that . . . I would, indeed, be proud to be the author of that article.

WILLIAM T. WOODSON
Chicago, Illinois

Pacific Northwest Regional Meeting

Portland, Oregon

■ The program for the Pacific Northwest Regional Meeting to be held in Portland, Oregon, at the Multnomah Hotel, Monday, Tuesday and Wednesday, May 24, 25 and 26, has now been completed.

Over 1000 lawyers and their wives from California, Nevada, Oregon, Washington, Idaho, Montana, Wyoming and Utah, are expected to attend.

The program is made up of institutes and workshops which are being put on by the following Sections of the Association: Administrative Law; Corporation, Banking and Business Law; Insurance Law; International and Comparative Law; Judicial Administration; Labor Relations Law; Municipal Law; Real Property, Probate and Trust Law; Taxation; and the Association's Special Committee on Legal Service to the Armed Forces.

In addition to the institutes and workshops the Oregon State Bar and the Multnomah County Bar Association, the hosts for the meeting, have arranged a continuous round of receptions, breakfasts, luncheons, banquets, sightseeing and other entertainment.

The meeting will open with a reception given by the Multnomah County Bar Association at the Multnomah Hotel from 5:00 to 7:00 P.M. on Sunday, May 23.

The formal program will commence at 9:30 A.M. on Monday, May 24, with President William J. Jameson presiding. After the addresses of welcome by Governor Paul L. Patterson and other dignitaries and the response to be given by David F. Maxwell, the Chairman of the House of Delegates, President Jameson will then deliver his address, to be followed by an address by another distinguished Bar leader.

The Judge Advocates General of the Armed Services will be the honor guests at the Assembly luncheon Monday, and the institutes and workshops will commence that afternoon at 2:00 o'clock, with the program of the Section of Taxation. At the same time there will be a "bread and butter" session on law office management and development of practice.

A reception will be given by the Oregon State Bar from 5:00 to 7:00 Monday evening, to be followed by dinners in the homes of the Portland lawyers for the visiting lawyers, judges and law teachers.

On Tuesday, the various law fraternities will have breakfasts at 8:00 A.M., and the Tuesday morning institutes and workshops will be put on by the Corporation, Banking and Business Law Section, the Section of Labor Law and the Section of Municipal Law.

There will be an Assembly luncheon on Tuesday honoring the judges in attendance at the meeting, at which Chief Justice Earl C. Latourette of the Oregon Supreme Court will be the toastmaster.

Tuesday afternoon, the Section of Administrative Law and the Section of International and Comparative Law will present their programs, to be followed by the banquet at 6:30 P.M.

On Wednesday, the Insurance Law Section and the Section of Judicial Administration will present a trial tactics workshop, and at noon the law schools and the American Judicature Society will have their luncheons.

Those desiring to attend the meeting should send their requests for hotel reservations to Donald W. Morrison, Registrar, 800 Pacific Building, Portland 4, Oregon.

OUR YOUNGER LAWYERS

Thomas G. Meeker, Secretary and Editor-in-Charge, New Haven, Conn.

The Junior Bar Conference and Practice Development

■ After mature consideration, the Junior Bar Conference in 1953 established a Practice Development Committee. The purpose of this group is to assist younger lawyers in bridging the chasm between a legal diploma and earning a living. Is this problem like Mark Twain's observation on the weather, or can we insure adequate practical competence and compensation among our new professional brethren?

The following goals have been recommended by the Committee for 1954: (a) a Practice Development Kit; (b) a practice development bibliography; (c) encouraging institutes on practice development; and (d) practice development through organization, *i.e.*, ways in which the practice of individual members may be improved by concerted action.

To help young lawyers help themselves, a Practice Development Kit would consist of approximately a dozen pamphlets, some of which would be furnished all new members, the others being available at nominal cost at Association headquarters. Suggestions for such pamphlets include "Lists of Existing Lawyer Placement Bureaus", "Forwarding Fees and Collection Charges", "How To Make Up Reports to Insurance Companies", "Court Calendars, Dockets and Motion Practice", and "Ambulance Chasing and Contingent Fees". In addition to these, the feasibility of mimeographing or reprinting summaries of useful articles and portions of books is under consideration.

The importance of a practice development bibliography is evident. One of the first tasks is to organize information on what has already been well written in order to know what needs to be done and to help those seeking materials on practice improvement. Miller, Quindry, Seligson and Tracy have all written books on this subject. Reginald Heber Smith has made several important contributions, often in American Bar Association publications. Specialized articles on where to practice, law office organization, practical tips in professional skills, local procedure guides and on "ethics, economics and the practicing lawyer" are available but apparently not collated.

As with lawyer placement and lawyer reference, other committees of the JBC are devoted exclusively to institutes or seminars for practicing lawyers. They will no doubt welcome such outstanding materials on practice development as those used in the Seminar on Connecticut Practice and Procedure held July 6-23, 1953, for law graduates; similar discussions are planned in Georgia.

If bar associations fail to lift a hand to aid those younger members of the profession who are not yet earning a living, how can they expect to garner strong support? Ethics and economics are closely intertwined in the mind and action of the young lawyer. Could forwarding from overworked older lawyers to their younger colleagues be encouraged by recommended mutually advantageous procedures? Would senior counsellors, locally available to younger lawyers for advice on ethics and business arrangements be feasible? Could the Canon providing for care of deceased and disabled lawyers' dependents be implemented by providing a marketplace where a practice was sold before it dissipated? These and many other possibilities of practice development through organization are an essential field for Committee exploration.

Ephraim Tutt had a high chair for nonpaying clients, the front legs of which were two inches shorter than the rear. Of course, there is more to practice development than such negative tricks of the trade. The many fruitful techniques to aid practice development offer a valuable challenge to this JBC enterprise.

Junior Bar Conference Notice of Elections

■ At the Annual Meeting in Chicago in August, 1954, there will be an election for the national office of Chairman, Vice Chairman and Secretary to serve during the calendar year 1955. In addition, at the Annual Meeting in 1954, Council representatives will be elected from the following circuits: 2, 4, 6, 8, 10 and 9-10 At Large. ON OR BEFORE JUNE 15, 1954, A NOMINATING PETITION MUST BE SUBMITTED IN ORDER FOR A CANDIDATE TO BE CONSIDERED BY THE NOMINATING COMMITTEE FOR NATIONAL OFFICE; in addition, nominating petitions may be submitted for Council representatives; all such petitions must be signed by at least twenty members of the Conference and submitted to the Chairman, C. Baxter Jones, Jr., 1516 First National Bank Building, Atlanta, Georgia, in the manner set forth in the Junior Bar Conference By-Laws, Article 33, Section 4.

THOMAS G. MEEKER
National Secretary

Activities of Sections and Committees

SECTION OF CRIMINAL LAW

■ A number of bills pending in the current session of Congress importantly affect areas in which the Section of Criminal Law has an interest. Two of these areas, the problem of immunity for witnesses and the matter of wiretapping, are among the most controversial the 83d Congress is likely to consider.

At a meeting held in January, supplemented by the circulation of drafts and comments, the Section's council, in conjunction with its Committee on Organized Crime, selected what appeared to be the best bill in each of five such areas, for submission to the House of Delegates at the Atlanta Midyear Meeting. In the two mentioned above, immunity and wiretapping, there was vigorous dissent from the majority recommendations. It was felt, nonetheless, that both merited the attention of the Association at this time, for both are likely to receive a great deal of attention in Washington in coming months.

Four of the five bills thus recommended by the Section, including the proposal on immunity, were approved; the fifth, on wiretapping, was rereferred for additional study. The approved measures are *H. R. 6899* (immunity for witnesses appearing before congressional committees, federal grand juries and federal courts); *H. R. 7118* (which extends the federal conspiracy law to include conspiracies using interstate commerce in furtherance of crimes against state laws); *H. R. 7311* (imposing controls on the transmission of certain types of gambling information in interstate and foreign commerce); and *H. R. 7404* (permitting appeals by the government from pretrial orders suppressing evidence in criminal prosecutions). The wiretapping bill, which was submitted to the House of Delegates and referred back to the Section without action, was *H. R. 477*.

Plans for the Section's program at the Annual Meeting in Chicago are well under way, and will probably include, among other things, a full session on wiretapping and problems related thereto.

SECTION OF JUDICIAL ADMINISTRATION

■ Material for a forthcoming Directory of American Judges is being assembled for the Section of Judicial Administration by local members of the American Law Student Association, as the result of an arrangement entered into between Judge Arthur F. Lederle, Chairman of the Section of Judicial Administration, and Bill E. Brice, President of the American Law Student Association.

The purpose of the project is to assemble data from which such a directory may be prepared for publication. At present there is no source from which the identity and addresses of all judges of courts of record can be ascertained. Because of the rapidly growing interest and activity in the field of judicial administration, the need for a single volume directory is now acute.

It is hoped that by the end of the current year, data will be at hand from which an alphabetical list of all judges of federal and state courts of record in the United States can be prepared. When this material is ready, arrangements for publication will be undertaken.

SECTION OF LABOR RELATIONS LAW

■ The Section participated in the Southern Regional meeting in Atlanta, conducting a panel discussion on the subject of federal pre-emption in the field of labor law. Moderator at the session was Archibald Cox, Professor of Law at Harvard. Participating in the panel discussion were Cecil Simms, of Nashville, and Horace Wilkinson, of Birmingham, presenting the view of state supremacy, and Edwin M. Pearce, of Atlanta, and Plato E. Papps, of Washington, D. C., presenting the view of federal supremacy.

There was an address by Philip Ray Rodgers, a member of the National Labor Relations Board, and a discussion of the proposed amendments to the Taft-Hartley Act.

John W. Morgan has been elected a member of the Council to replace retiring member James A. Woods.

All arrangements for the Section were made by a Southern Regional Committee consisting of Frank A. Constangy, Atlanta, Chairman, Warren E. Hall, Jr., Deland, co-Chairman, John Wesley Weekes, Decatur, and Jac Chambliss, Chattanooga

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Immunity for Witnesses:

An Inventory of Caveats

by **Rufus King** • of the District of Columbia Bar

■ In this timely article, Mr. King notes some difficulties in the position adopted by the House of Delegates of the Association on legislation pending in Congress to provide immunity from prosecution to certain persons who claim their Fifth Amendment privilege against self-incrimination. He states six considerations that weigh against adoption of the immunity bills, one of which has already been approved by the Senate.

■ The immunity device for stripping witnesses of their Fifth-Amendment privilege against self-incrimination grounds in impeccable reasoning: If whatever crimes the witness might otherwise reveal are absolved in advance, his testimony cannot possibly result in incrimination; therefore the testimony must cease to be privileged. So an immunity grant is always a bargain, a pardon for crimes that would otherwise be punishable, given in return for testimony that could otherwise be withheld.

Such bargains have been recognized for almost a century[1] as permissible encroachments on the Fifth Amendment. They are at present available to a score of specialized federal agencies such as the ICC, the SEC, the FCC, the NLRB, etc.[2] But for many decades past, the device has been neither widely relied upon nor much abused within the federal structure. It has failed to attract significant attention in any quarter, until very recently.

In the spring of 1951, Senator Pat McCarran introduced the first current federal proposal on the subject, to revive Congress's long-defunct powers[3] with respect to immunity for witnesses summoned in congressional investigations. In the same session, Senator Estes Kefauver's Crime Committee launched a bill to vest immunity powers in the Attorney General for use in any proceeding before a federal court or grand jury.

Pressures have been growing behind these measures ever since. The American Bar Association has formally endorsed the Crime Committee's bill (S. 1747, 82d Congress, now S. 565, 83d Congress),[4] while the McCarran bill (S. 1570, 82d Congress, now S. 16, 83d Congress) passed the Senate on July 9, 1953, and awaits only action on the House side in the present Congress. Attorney General Brownell has vigorously endorsed both measures,[5] and President Eisenhower referred to the immunity problem in his State-of-the-Union message in January. There are several other bills pending on the same subject.[6]

In short, if Administration support continues, there is a good likelihood that Congress may act favorably during the present session on these important enlargements of the immunity device. And clearly they *are* important; loosing congressional committees with immunity powers at this time would be likely to have drastic effects, for better or for worse;

1. The first federal immunity statute was the Act of January 24, 1857, 11 Stat. 155, immunizing witnesses who testified before Congress and congressional committees. This statute was so flagrantly abused by witnesses that it was soon restricted by drastic amendment. Act of January 24, 1862, 12 Stat. 333.

2. Citations are collected in the Senate Judiciary Committee's Report on S. 16, Sen. Rep. No. 153, 83d Congress, page 12. This document is an admirable brief on the subject.

3. The 1857 congressional statute, as amended in 1862, has never been repealed (18 U. S. C. 3486); but it has been generally conceded to be ineffective since an identically worded measure was so held in *Counselman* v. *Hitchcock*, 142 U. S. 547 (1892). See, *U. S.* v. *Bryan*, 339 U. S. 323, 335 (1950). The pending bill would revise §3486 to incorporate the formula approved in *Brown* v. *Walker*, 161 U. S. 591 (1896), for a similar measure.

4. Report of the American Bar Association Commission on Organized Crime, September, 1951, pages vii, 52-3. N. Y., The Grosby Press.

5. See e. g., *U. S. News and World Report*, December 25, 1953, pages 90-95. General Brownell urges however, that the Attorney General should have absolute control over congressional grants, which S. 16 fails to provide. A consolidation of S. 16 and S. 565, giving such control and therefore probably representing the Administration's viewpoint, has recently been introduced by Representative Keating of New York (H. R. 6899).

6. H. R. 2737, H. R. 4489, H. R. 6899, and H. R. 6948. All but H. R. 6899 referred to *supra*, note 5, are addressed to congressional grants only, and differ chiefly as to the degree of control to be vested in the Attorney General or Congress and its committees.

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giving such powers to federal prosecutors and private litigants throughout the land—even indirectly—would be unprecedented.[7] At very least the prospect merits thoughtful attention from responsible members of our profession, since inroads upon a major Bill of Rights safeguard are involved.

It is not the purpose of this analysis to attack the pending proposals unreservedly. Possibly they ought to be given a trial as federal laws.[8] Certainly they would be salutary in some investigative and law-enforcement situations. But surrounding them are troublesome problems which seem to multiply as the immunity concept is expanded. Among such problems are the following:

Immunity Under Federal Law Does Not Bar State Prosecution

First, immunity conferred by a federal statute does not bar prosecution for the identical offense under local laws. In 1896 in the landmark case of *Brown* v. *Walker*,[9] a bare majority of the Supreme Court brushed aside the proposition that a witness could be subjected to state prosecution based on testimony forced from him under a federal grant of immunity, on the ground that the federal statute would actually operate as a bar to the enforcement of state criminal laws.[10] When the reverse proposition came up—*i.e.*, that a *state* immunity statute was invalid because it conferred no protections against federal prosecution—the Court, driven to a different rationale, offered the observation that federal prosecutors simply would not be unsporting enough to resort to such tactics:[11]

> We do not believe that in such case there is any real danger of a Federal prosecution, or that such evidence would be availed of by the Government for such purpose.

The following year, seemingly disavowing the *Brown* reasoning further, the Court upheld another *federal* immunity grant by reference to the sportsmanship ground: ". . . a danger [*i.e.*, of state prosecution] so unsubstantial and remote did not impair the legal immunity",[12] citing also the English rule on possible incrimination under the laws of foreign nations: ". . . the only danger to be considered is one arising within the same jurisdiction and under the same sovereignty".[13]

The Court has clung to the separate sovereignty reasoning ever since, holding that the danger of state prosecution creates no privilege in federal proceedings,[14] and, in 1944, abandoning all shreds of the sportsmanship notion, it approved precisely what the early cases had refused to recognize as even a noteworthy possibility. One Feldman, interrogated under a New York creditor's statute which compelled testimony in return for immunity, unblushingly explained to his creditors that his apparent affluence had come from the practice of "kiting" checks. Thereafter he was indicted and prosecuted in a federal court under the federal mail fraud statute, *and convicted upon the direct transcript of his testimony in the New York proceeding, introduced as evidence in the federal case.* The Supreme Court affirmed.[15] The majority opinion leaned on the analogy to search and seizure under the Fourth Amendment; the Court's acknowledgment of its forebears' lofty disdain for such tactics was terse and possibly a little embarrassed:[16]

> Only a word need be said about the phrase of scepticism in *Jack* v. *Kansas* . . . that it could hardly be imagined "that such prosecution would be instituted under such circumstances". The "prosecution" and the "circumstances" there referred to were a prosecution on the same facts for violation of the state and the federal antitrust laws. . . . The cautionary words in *Jack* v. *Kansas* in no wise qualified the principle of that and later cases as to the separateness in the operation of state and federal criminal laws and state and federal immunity provisions.

There was of course a vigorous dissent.

It seems obvious that when testimony is extracted from a witness under compulsion in one of our overlapping jurisdictions, and then such testimony is used directly or indirectly to convict him of a crime under the laws of another, the Fifth Amendment injunction that no person "shall be compelled in any criminal case to be a witness against himself" is being travestied. Sooner or later, if this difficulty is not resolved the Supreme Court may be swamped in hardship cases, and conceivably induced to restrict or invalidate the entire immunity device.[17]

Second, the immunity "bargain" seems morally questionable. In some lights at least, the balance of values implicit in the immunity statutes is something less than satisfying.[18] In

7. The statute invalidated by the *Counselman* case, *supra*, note 3, purported to immunize "any pleading . . . discovery or evidence obtained from a party or witness by means of a judicial proceeding in this or any foreign country". Act of February 25, 1868, 15 Stat. 37. But the statute was defective, hence never used, and was repealed by Congress in 1910. Act of May 7, 1910, 36 Stat. 352.

8. On March 8, 1954, acting on a report in which the author concurred, the House of Delegates approved H. R. 6899 and authorized the Section of Criminal Law to urge its enactment by Congress.

9. *Supra*, note 3.

10. 161 U. S. at pages 606-8. This conclusion is demolished in one of the dissents, *ibid.* at pages 622-6, and had not been seriously urged until last month. See note 17, *infra*.

11. *Jack* v. *Kansas*, 199 U. S. 372, 382 (1905). A similar notion had been suggested as a makeweight, in the *Brown* case, 161 U. S. at page 608.

12. *Hale* v. *Henkel*, 201 U. S. 43, 69 (1906).

13. *Ibid.* See also, *Nelson* v. *U. S.*, 201 U. S. 92, 116 (1906).

14. *U. S.* v. *Murdock*, 284 U. S. 141, 148-9 (1931); *Snyder* v. *Massachusetts*, 291 U. S. 97 (1934).

15. *Feldman* v. *U. S.*, 322 U. S. 487 (1944).

16. *Ibid.*, pages 491-2 (citations omitted).

17. In *Adams* v. *Maryland*, decided March 8, 1954, the Supreme Court unanimously reversed a state court conviction obtained through the admission of testimony given by the defendant before a committee of the United States Senate. No question of immunity was raised, but the opinion rests on the language of Congress' moribund immunity statute, 18 U.S.C. 3486, *supra* note 3. Significantly, six Justices revive *Brown* v. *Walker* for the proposition that ". . . since Congress in the legitimate exercise of its powers enacts 'the supreme Law of the Land,' state courts are bound by §3486, even though it affects their rules of practice". This is a provocative revival; could it suggest sanction for congressional efforts to expand immunity directly, at the expense of state prosecutors? Or does it merely overturn the extreme doctrine of the *Feldman* case? Or would the Court still permit federal prosecutors to do what it thus forbids at the hands of the states? In any event, the sponsors of federal immunity legislation, its endorsers, its critics and its opponents, must alike take heed that new forumulations are possibly in the making within the high Court. And §3486 must hereafter be viewed with more respect than it has been accorded in its half-century existence as a neglected invalid.

18. Note in this respect the dissents by Justice Field in *Brown* v. *Walker* (161 U. S. at page 629), and by Justice Black in the *Feldman* case (322 U. S. at page 494).

every case the interrogating authority enters into a special "deal" with a wrongdoer, to buy his testimony at the price of exoneration for one or more committed and unpunished crimes. This is the specter of the turncoat, the informer, the "stoolie" and the "spin". It is the cynical pay-off to the culpable state's witness who has helped the prosecutor make his case.

Quaere whether it is really justifiable, except in very rare instances, to pursue *any* quest for facts in this manner? And even viewed as a matter of pure expediency, *quaere* how reliable the facts will be, and how credible the testimony, anyway?

It would certainly be no defense for a felon in the dock to explain that he had done his heinous worst because some congressional committee studying heinousness wanted to hear him testify about it; why should he have the windfall of a complete defense, after the fact, merely because some such body *does* happen to want to hear him before he is caught and brought to justice?[19]

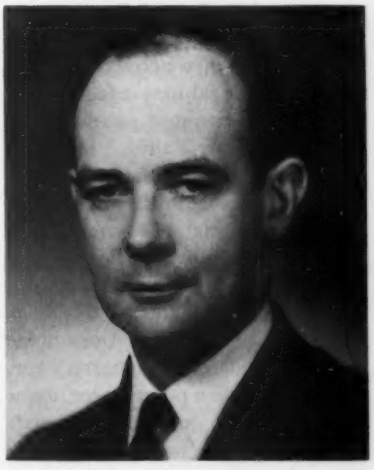
Are We Going Too Far?

In our legal system (unlike, incidentally, others) we give the accused, whether guilty or innocent, a singular advantage in that he does not have to submit to direct interrogation about the charges against him. This advantage extends also to the *guilty* unaccused, and to interrogations which merely threaten to expose an undetected crime. So much, it may be argued, is enough. To go further and permit the same concessions to be parlayed—by the guilty only—into complete exoneration, is perhaps to go too far.

Third, both the "quid" and the "quo" are uncertain, so the interrogating authority is always bargaining somewhat blindly. If pardons are to be thus traded to wrongdoers, at least the terms of the transaction should be clear in each case. Yet this is seldom possible. Usually the witness is hostile—genuinely afraid, or calculatingly exploiting his advantage, or both—so that his examiners cannot know exactly what value the withheld testimony may actually have. At the same time, and especially in broad legislative inquiries, it is impossible to tell in advance just what crimes are likely to be exonerated. The witness may have a surprise ready for his questioners at every turn of the proceedings.

Moreover, the privilege against incrimination is itself so complicated that no one, witness, questioner, counsel, chairman or judge, can be sure of its application under all circumstances. If there is no privilege, then manifestly there should be no immunity. But when is there no privilege? It may have been waived if the witness has answered a question too closely linked to the taboo subject matter.[20] Conversely, it may attach to some line of inquiry only tenuously connected with the witness's offense.[21] It is nonexistent if the crime was committed in another jurisdiction or against a different sovereign,[22] and it has no application merely for the protection of another, to avoid embarrassment or degradation, or with respect to offenses no longer punishable because of a statute of limitations, the repeal of a law, prior jeopardy, and so forth.

Beyond these obvious puzzlers in the realm of fact, there are tough problems as to the very nature of the concept itself: For instance, is the privilege ever available to an *innocent* person who has a bona fide fear of prosecution and wrongful conviction?[23] And—with or without a statutory reference on the subject[24]—can a witness properly rely on his privilege when his only fear is either that he may presently perjure himself or that present truthful answers will enmesh him in conflicts with earlier sworn testimony?



Rufus King practices in Washington, D. C. (Yale LL. B., 1943). He has served as counsel to half a dozen congressional committees, drafting their reports and legislative programs. A member of the New York and District of Columbia Bars, he is Secretary of the American Bar Association's Section of Criminal Law and Chairman of the Criminal Law Section's Committee on Narcotics and Alcohol.

It must be remembered that the witness—who alone knows what he fears to disclose—cannot be pressed very far as to the exact nature of his misgivings, for to do so would be to demolish the very protection which is at issue. With respect to this last point, however, it should be noted that judicial proceedings are far more efficient than the legislative inquiry, for in the former the judge can satisfy himself of the validity of the claim of privilege (and, if he wishes, the worth of the testimony also) by whatever private examination of the witness may be necessary.

A bill[25] sponsored in the present Congress by Representative Keating would permit congressional commit-

19. No privilege attaches on account of any crime for which the witness has been tried and convicted or acquitted. Persons in this status—the caught instead of the uncaught—often would furnish more reliable information about the subjects of Congress's inquiries than their counterparts who are still a jump ahead of the law. But the dramatic value of the chastened and docile penitent is almost nil.

20. *U. S. v. Rogers*, 340 U. S. 467 (1951). The privilege is also waived, of course, if it is not pleaded at all. *Vajtauer v. Commissioner*, 273 U. S. 103 (1927). There is no such involuntary waiver rule in England. See, 8 Wigmore on Evidence (3d ed.), §2276; *Rex v. Garbett*, 2 C. & K. 474. (1847).

21. See, *Hoffman v. U. S.*, 341 U. S. 479 (1951).

22. *Supra*, at notes 11 and 12.

23. See, e. g., the dissent in *Brown v. Walker*, 161 U. S. at page 628; Wigmore, *op. cit.*, §2272 *et passim*; Metzler, "Invoking the Fifth Amendment, 9 *Bulletin of the Atomic Scientists*, June, 1953, pages 177-8.

24. 18 U.S.C. 3486 excludes prosecutions for perjury from the immunity conferred; the pending bills exclude perjury and contempt, the latter having been added to meet a problem raised in *U. S. v. Bryan*, 329 U. S. 323 (1950).

25. H. R. 4975.

tees to apply to federal district courts for a court order enforcing any committee order when necessary. One of this measure's salutary effects would be to assure a prompt judicial determination of any claim of the privilege which the committee sought to disallow—thus permitting an examination of the claim in camera by a disinterested judge. The Keating Bill deserves more attention than it has received to date. It might, in fact, diminish Fifth Amendment problems and revive Congress's contempt powers to a point where immunity legislation could be dispensed with altogether, on the legislative side at least.[26]

Fourth, immunity powers would strengthen the prosecutor . . . and the persecutor; never his victim. It is no accident that every one of the chief proponents of immunity legislation for congressional committees happens to have been recently identified with investigations which focussed on the crimes and defections of individuals, *viz.*, communism and subversion, crime syndicate activities, and corruption in government. These have been the areas in which congressional committees sometimes tend to usurp the judicial function by putting individuals on trial. And trial by oath is precisely the reason the privilege against self-incrimination was developed in the first place.

Immunity Would Increase Powers of Investigators

In this circumstance it must be noted that an immunity statute would help the witness-defendant not at all, but would actually increase the investigating body's already impressive powers to inflict injury. Congressional committees are open to the charge of abusing the Fifth Amendment every time they publicly equate a plea of the privilege with the plea —which has no rightful place in their proceedings—of "guilty". And this has not been an uncommon phenomenon. As a result, the witness who is merely driven to the plea may suffer loss of reputation, loss of livelihood, and loss of credit and esteem, quite as fully as if he had been tried and convicted in court.[27]

It will always be the committee, and never the witness, who decides whether to give or withhold immunity after the privilege has been pleaded. The witness can be forced to the plea, as he is at present. Thereafter the committee must determine whether to immunize him to testify further (and perhaps to clarify his position), or whether to let the plea stand. If, conceivably, the investigation is colored by motives such as headline-making or a desire to "get" the witness, the committee's decision would necessarily be influenced by such motives *pro tanto.*

And note that the safeguards written into S. 16 and H. R. 6899, calling for concurrence by two thirds of the committee, including at least two minority members, before the grant could be made, might quite as easily aggravate this problem as help solve it.

Fifth, broad immunity legislation would revive the danger of the "immunity bath". The 1857 congressional immunity statute[28] exonerated "any fact or act touching which" a witness might be required to testify before a congressional body. The result was that wrongdoers soon began to storm Congress for a chance to talk themselves and their crimes out of reach of the law. The high-water mark was probably the Interior Department official who blithely volunteered to a committee that he had embezzled some two millions of public funds in federal bonds.[29] As has been noted, Congress thereafter restricted the statute so far the other way that it ceased to confer immunity at all.

The current proposals contain more safeguards than the old statutes. In each case the witness must plead his privilege; exoneration is not automatic. In the court and grand jury bill[30] and in the consolidated version,[31] the Attorney General must find that the grant is "necessary to the public interest" before it can be made; in the congressional bill,[32] notice must be given to the Attorney General one week in advance, and if he does not assent to the grant, only a vote of the full Senate or House of Representatives can override him. The Attorney General is given this power because it is felt that he, as the nation's chief law-enforcement officer, is in the best position to tell whether a particular grant would exonerate too much, as for instance if the immunity might defeat some important prosecution then being prepared by the Department of Justice.

Possibly such safeguards will be enough, if they are diligently and accurately applied. But accuracy, as has been emphasized, is very hard to achieve in matters pertaining to the privilege, while there will be strong pressures—even apart from sheer volume—to temper diligence with other considerations. How firm is the Attorney General likely to be, for example, in saying "no" to committees of Congress? And what can he do if, when federal prosecutors are using immunity to get testimony to win convictions, a *defendant* in a criminal case comes along with key witnesses who refuse to testify because of *their* privilege? Is not the latter, in common fairness and perhaps as a matter of due process, entitled to the same advantage? And if so, what defense lawyer will forgo the temptation to parade underworld characters through the courtroom on any possible pretext?[33]

One important safeguard has been

26. Pressure for immunity powers has centered in Congress and Congress' own problems, until the Administration's recent expressions of interest; it is doubtful whether the court and grand jury bill (S. 565) would muster very much support by itself; it has not even been considered by the Senate Judiciary Committee, where it has lain during three sessions.

27. Some commentators have also emphasized the growth of administrative discretion in matters such as the issuance of passports, eligibility for licenses (FCC, ICC, etc.), public employment and so forth, as areas of potentially grave official sanction which are not reached at all by immunity grants.

28. *Supra*, note 1.

29. Congressional Globe, 37th Congress, 2d Session, proceedings January 22, 1862, page 428.

30. S. 565.

31. H. R. 6899.

32. S. 16.

33. It is rumored in Washington that one of the important regulatory agencies endowed with automatic immunity powers actually was blackmailed recently into abandoning an enforcement proceeding when counsel let it be known that he was canvassing the country for big-time lawbreakers to work into his case for the defense.

omitted from the pending bills, namely, a requirement that some judicial officer should also approve each grant.[34] In court and grand jury proceedings, the judge is the logical authority to determine whether the privilege is claimed in good faith and on valid grounds; in congressional hearings—given a statute like H. R. 4975, *supra*, note 25—a judge would be available to make the same determination with respect to committee witnesses, at least whenever the committee challenged the witness's plea by seeking an order compelling the testimony.

Sixth, wholesale immunity grants in the courts are likely to make trouble on the civil side. The pending bills do not limit the applications of the immunity concept to criminal prosecutions; grants would presumably be available, upon application to the Attorney General, in civil cases as well. He would have to find each to be "necessary to the public interest", but the pressures on him to do so, in the Government's own cases, for example, might be considerable.

One specter, which was only a fleeting shadow in the Civil War era when broad immunity was first tried, is the phenomenon of income-tax enforcement. The variety of questions that might expose a witness's tax defections is almost infinite,[35] and it is noteworthy that the proposed grants would relieve from penalties as well as from prosecution. Witnesses may well start balking at anything relating to their business affairs, playing for a chance to blurt, "I cheated in the amount of blank thousands on my return last year."

The sheer weight of applications for rulings, on grants requested by defendants and litigants as well as by United States Attorneys, might prove surprising. In fields like taxation (and a wide range of regulatory patterns which include criminal sanctions), the Attorney General will *not* have special information at hand to guide him. And of course every application would mean a case stalled on a docket somewhere (usually in the middle of a trial) waiting for action from Washington.

Furthermore, to what extent will testimony compelled from a witness under an immunity grant be admissible against him in a civil proceeding? The pending bills make no reference to this problem, which could conceivably work acute hardship in some circumstances.

In summary, the current immunity proposals should be approached with caution. There appear to be no easy solutions for problems such as their relation to state and local laws, their limitations because of uncertainty in the concepts they affect and their susceptibility to abuse by congressional committees, defendants in criminal prosecutions and possibly witnesses and litigants in civil proceedings. The bargain underlying immunity grants is faintly immoral, while the dangers of "immunity baths" on the one hand and the difficulties of vesting adequate controls in the Attorney General, on the other, look like Scylla and Charybdis close set.

In any event, consideration should be given to adding the feature of concurrence by a judicial officer in each grant, coupled with new legislation to allow congressional committees to avail themselves of the federal courts in the enforcement of their orders. And in the light of last month's *Adams* case, care should be taken not to eliminate §3486 of Title 18 without revealing its newly revealed worth.

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34. *Cf.*, Kernochen, "Model State Witness Immunity Act and Commentary", the excellent study and draft prepared for the American Bar Association Commission on Organized Crime. Final Report, A. B. A. Commission, September, 1952, pages 168-173. N. Y., The Grosby Press.

35. This, second only to Communist affiliations, has most plagued congressional investigators. See, e. g., Hearings, Senate Crime Committee, Part 19, pages 121 *ff.* (82d Congress August 7, 1951); Final Report, *Ibid.*, Sen. Rep. No. 725, page 95 (82d Congress,) Sept., 1951].

■ *Annual Meeting of American Law Institute*

■ The 31st Annual Meeting of The American Law Institute will be held in Washington, D. C. on May 19, 20, 21 and 22. Headquarters for the Meeting will be the Mayflower Hotel.

The Meeting will discuss the latest drafts presented by the reporters on the Federal Estate and Gift Tax Statute, Model Penal Code, and Revisions of the Restatement of the Law of Conflict of Laws and Agency.

The Chief Justice of the United States will address the Meeting at its opening session on Wednesday morning, May 19.

On Thursday evening, May 20, there will be a panel discussion on "Crime and Punishment—American Style". George Wharton Pepper will preside. Speakers will include Mr. Justice Jackson; Professor Herbert Wechsler, of Columbia University Law School; the Director of Federal Prisons, James V. Bennett; and Judge Gerald Flood of the Court of Common Pleas of Philadelphia.

The Annual Dinner of the Institute will be held the evening of Friday, May 21 at 8:00 P.M.

Full information as to the Meeting will be contained in the formal program for the meeting which will be published soon.

The Langer Bills:

A Discussion

by Harry S. Gleick • of the Missouri Bar (St. Louis)

■ Four bills introduced in the last session of the present Congress would make rather substantial changes in the Bankruptcy Act. Mr. Gleick expresses grave doubts about the wisdom of Senator Langer's proposals, which apparently have received little publicity.

■ On August 1, 1953, the Chairman of the Senate Judiciary Committee, William Langer, of North Dakota, introduced in the Senate four proposed amendments to the Bankruptcy Act, numbered S. 2560, S. 2561, S. 2562 and S. 2563. Because these bills contemplate revolutionary changes not only in the law of bankruptcy but in our jurisprudence generally, they have aroused considerable interest among those members of the Bar familiar with their provisions. It seems desirable at the outset to set forth a brief résumé of their contents.

S. 2560 provides for the appointment of official salaried attorneys to represent receivers and trustees in bankruptcy, at salaries not to exceed $7500 per annum for part-time attorneys and not to exceed $15,000 per annum for full-time attorneys. The attorneys are to be appointed by the official receivers or trustees (see S. 2561). Such salaries would be paid out of special funds constituted in a manner similar to the present Referees' Salary Fund. According to the bill, such attorneys would be deemed employees of the judicial branch of the Government within the meaning of the Civil Service Retirement Act, but tenure of each such attorney would be limited to the term of the receiver or trustee appointing him. There are certain complicated provisions respecting the employment of counsel, *viz:*

> When the same individual is selected to serve both as a part-time receiver and as a part-time trustee, he may select one attorney or firm of attorneys to represent him on a full-time basis in his capacities as both a part-time receiver and a part-time trustee, or he may select one attorney or one firm of attorneys to represent him on a part-time basis in his capacity as a part-time receiver, and another attorney or firm of attorneys to represent him on a part-time basis in his capacity as a part-time trustee. No individual selected to serve solely as a part-time receiver, or solely as a part-time trustee, shall select a full-time attorney or firm of attorneys to represent him in his part-time capacity.

Any receiver or trustee may petition the judge to appoint additional special counsel where it appears that the regularly appointed attorney cannot perform the services required of such special counsel. The bill contains various other provisions, the most startling of which would repeal certain of the General Orders in Bankruptcy promulgated by the Supreme Court.

S. 2561 provides for the selection of salaried receivers and trustees in bankruptcy, both full-time and part-time. It further authorizes the business of bankrupts to be conducted "for limited periods" by receivers, marshals or trustees, and provides for the employment by them of "such additional employees as will enable them to more efficiently discharge their duties in conducting the business of the bankrupt". Subject to the approval of the judge, the bankrupt and his attorney may be so employed. Like S. 2560, this bill provides for the repeal of certain General Orders in Bankruptcy of the Supreme Court and would amend a number of others. The bill contains detailed and somewhat complicated provisions for the classification, selection and tenure of receivers and trustees.

S. 2562 would require that United States Attorneys protect the interest of investors in enterprises involved in bankruptcy. It provides that the clerk of the District Court notify the United States Attorney of the filing of every bankruptcy proceeding, who "shall forthwith enter his appearance therein and be present at all hearings before the judge, referee, receiver, and trustee and all meetings of creditors and creditors' commit-

tees". The United States Attorney is to be kept advised of every action in every case, receive copies of every report and be given a reasonable opportunity to be heard at all meetings. Whenever the judge determines that there is reasonable cause for belief that the interest of any investor is in jeopardy, he is to issue a restraining order until a hearing be had. At such hearing it "shall be the duty of the United States Attorney to introduce evidence, examine witnesses", etc. The bill makes it the specific duty of the United States Attorney in every proceeding in bankruptcy "to (1) represent and protect the interests of investors in enterprises involved in such cases, and (2) to ascertain whether all officials and parties to such proceedings properly perform their duties under the provisions of this Act and orders promulgated thereunder".

S. 2563 does not require the United States Attorney to enter his appearance, but it would authorize intervention by him in any bankruptcy cause either on his own motion or "whenever any investor in any enterprise involved in any proceeding under this Act has reason to believe that any official or party to such proceeding is performing, or failing to perform, his duties under this section in such a manner as to jeopardize the interest of such investor". The United States Attorney must have reasonable ground for belief that the condition for complaint exists but he has the duty of investigating any complaint made by any investor or class of investors. If the United States Attorney finds there is just cause for complaint, he "shall file with the clerk . . . a verified written petition on behalf of such investor or class of investors". The burden of protecting the investors thereupon devolves upon the judge, but the United States Attorney continues to bear the burden of representing the investors.

On the same day these bills were introduced, a speech by Senator Langer in support of his proposals appeared in the *Congressional Record*. The Senator refers to the receipt by him in his official capacity as Chairman of the Senate Judiciary Committee of complaints "concerning abuses under our Federal bankruptcy system", and he then threatens to introduce legislation to abolish the federal bankruptcy system "to stop these injustices". Reference is made to the unethical practices and illegal fee splitting unearthed in the Donovan investigation and report of 1929-1930[1], and the Senator notes that his own investigation has turned up facts bearing great similarity to those revealed in the Donovan report. One specific complaint of present conditions is that "there has been a noticeable concentration of the bankruptcy practice in the offices of an extremely small group of attorneys". Objection is made to excessive administrative costs, in too many instances, the Senator states, running from 30 per cent to 50 per cent of the total assets realized.

The Purposes of Senator Langer's Bills

The Senator outlined as the purposes of his bills, (1) to secure bankruptcy administration by receivers, trustees, and attorneys "thoroughly experienced in this field", (2) to provide a system where compensation is not contingent upon the amount of assets or the time expended in administration, (3) to establish a system where all parties stand in a completely impartial relationship to all interested parties, (4) to reduce costs of administration and (5) to abolish any temptation to throw any business into bankruptcy where bankruptcy is not the proper remedy.

Upon reading Senator Langer's speech, one is impressed forthwith by his obvious sincerity. It must be that he has received diatribes against the present bankruptcy system by those who have lost their money through unfortunate investments and who feel that in some manner they should be protected, as bank depositors are, by the Federal Government. However that may be, the Senator has been greatly disturbed by the communications he has received and by his bills earnestly seeks to improve the system. But it would appear that the bills will not accomplish the ends sought by their author and that the evils they are apt to spawn will be worse than those they seek to cure. Moreover, certain of the Senator's conclusions seem open to challenge.

In his Senate speech, Senator Langer made the point that the Bankruptcy Act of 1867 was repealed in 1878 because of popular disgust, but he offered no comment on the fact that the crying need for a Federal Act was the reason for the enactment of a new law in 1898. As a matter of fact, the Act of 1898 was passed following the 1893 panic. Administration of insolvent estates by the states had not proved satisfactory. It is significant to note that the aggregate life span of the three bankruptcy acts preceding the present one was approximately sixteen years, whereas the present Act has been in effect for almost fifty-six years. The Senator goes on to charge that "the entire history of our Federal bankruptcy legislation in the United States is replete with repealing statutes, amendments, and investigations". Those most familiar with the development of bankruptcy law would argue that the amendments to the present Act, accomplished in most instances as a result of unselfish and unremunerated efforts, testify to the vigor and to the progressive thinking of the groups interested in the improvement of this branch of the law. The Internal Revenue Code is amended at practically every session of Congress, but no one would advocate its abolition on that account. There are some who argue the Criminal Code is not amended as frequently as it should be. It surely has been amended as often as the Bankruptcy Act, yet no one would seriously advocate its abolition because periodical improvements by legislative enactment are found desirable. Moreover, a substantial number of amendments to the Bankruptcy Act have been required for

1. W. J. Donovan *et al*, Administration of Bankrupt Estates, Report of an Inquiry . . . Conducted before Honorable Thomas D. Thatcher . . . House Judiciary Committee, 71st Cong., 3d Sess. (1931).

clarifying purposes, and in particular to nullify court decisions which apparently flouted the intent of Congress.

Under the present system of bankruptcy administration, it is the duty of the referees, subject to the supervision of the Administrative Office, to control the handling of bankrupts' estates: it is their duty to approve of the appointment of trustees and of attorneys for trustees, to fix the allowance of fees and to bring sufficient pressure upon trustees and counsel so that estates are efficiently administered and promptly closed. In case of improper conduct, the referees are in the best position to detect and eradicate wrongs. The Administrative Office of the United States Courts exercises real supervision over the activities of referees and is performing its functions in an excellent manner. Without knowing the nature of the complaints Senator Langer has received, it is difficult to comment upon them. Apparently many of these communications were received from investors, and anyone familiar with bankruptcy knows that almost invariably investors have been wiped out before the bankruptcy stage has been reached. Moreover, we are all aware of the fact that the small size of dividends received by general creditors in bankruptcy cases is largely due to the ever-increasing size of tax claims. Bankruptcies result in forced liquidation of assets, and forced liquidation of assets involves substantial shrinkage in values. Where bankruptcy administration has been inadequate or poor, this has been due to the failure of human beings and not to the weakness of the law. If any of those now entrusted with duties under the Bankruptcy Act are delinquent, the law provides for proper corrective action. Nothing is to be gained by diffusing control over the conduct of bankruptcy cases in the manner contemplated by the Langer Bills, under which referees would still have control, although the responsibility for proper administration would to a great extent be transferred to the offices of the United States Attorneys. It is not clear how this diffusion of responsibility would improve bankruptcy administration.

Under the Langer Bills, receivers and trustees would be appointed by the judges, since the author of the bills contemplates they would be appointed in a manner similar to the referees. Yet the referees would be required to supervise their actions. This would impose upon referees the duty of supervising the actions of appointees of the judges. It is not conceivable that supervision under such conditions could be satisfactory.

In S. 2562 and S. 2563, emphasis is placed upon the duty to protect investors, but almost nothing is said about the desirability of protecting creditors, and this although, as we have stated above, the interest of investors has been wiped out before the impact of bankruptcy. It is rare indeed that there could be any distribution to stockholders even if no charge were made against the assets of the estate for administrative overhead. There can be no distribution to investors when the funds are insufficient to pay creditors.

Reference is made by the Senator to a concentration of the practice of bankruptcy law in the hands of a limited number of attorneys. If that concentration has been brought about in any jurisdiction by any illegal, unethical or otherwise reprehensible acts, such acts should be exposed and the participants punished. But if a concentration has resulted because of the specialization by attorneys in the field of bankruptcy law, that specialization should be regarded as natural and desirable. Many fields of the practice of law have become highly specialized. The practice of bankruptcy law is an unusually technical one. Wherever there is such a specialty, there is *ipso facto* a limited field of practitioners. Concentration of practice in a special field in the hands of specialists is not to be deplored if the specialists are honest and if no one who seeks to become a specialist is deprived of the opportunity to do so.

Harry S. Gleick is a graduate of the University of Wisconsin (1915) and of the University of Wisconsin Law School (1917). He is Chairman of the Committee on Bankruptcy of the Section of Corporation, Banking and Business Law and a member of the National Bankruptcy Conference.

The Senator Contradicts Himself

It is somewhat confusing to note that in his talk before the Senate, Senator Langer at one point complains that in certain districts "there has been a noticeable concentration of the bankruptcy practice in the offices of an extremely small group of attorneys", and that on the other hand the first purpose of his bills, as stated by him, is to secure administration of bankruptcy proceedings by thoroughly experienced personnel. It seems obvious that the system contemplated by the Langer Bills would provide a fertile field for "bankruptcy rings". All except "the insiders" and the United States Attorney would be excluded from the practice of bankruptcy law. The provision that the official receivers could hire a special counsel for particular purposes, in addition to official counsel, would if enacted lead to unhealthy conditions. Moreover, the provisions authorizing the official receivers, trustees, and marshals to operate businesses, with no requirement for qualifications for such operations, and the further provisions allowing them to employ such personnel as

they deemed necessary are most undesirable. True enough, such appointments would be subject to the approval of the judge. But the judges necessarily would be compelled to follow the recommendations made to them, and it is not difficult to visualize the scandalous situations that could quite easily develop under such legislation.

Mention is made by the Senator of excessive costs and excessive allowances. Such are to be deplored. But in general, the practice of bankruptcy law is one of the least remunerative of all the specialties; in fact, so much so that it is unattractive to most able general practitioners. The statistics published by the Administrative Office show that in 1953 attorneys for trustees received on the average 7 per cent of the total amount of assets in bankruptcy cases, and that the aggregate percentage of fees paid all attorneys, including those for trustees, receivers, petitioning creditors and bankrupts, was in that year 11 per cent. The burden of additional administrative expense required under the Langer Bills is almost appalling.

During the fiscal year ending June 30, 1953, 40,087 bankruptcy cases were commenced and 37,485 were terminated, with 38,786 cases remaining undisposed of at the end of the year. On an estimated average of 2½ hearings and meetings per case, the enactment of S. 2562 would require the attendance of the United States Attorneys at over 100,000 such meetings per year. The Department of Justice estimates that the additional duties imposed upon it by the Langer Bills would require no less than 100 additional Assistant United States Attorneys and an equal number of clerk-stenographers. This estimate does not take into consideration the number of meetings of creditors' committees that United States Attorneys would be compelled to attend. It appears that even so the estimate is entirely too low. Under bankruptcy administration as contemplated by the Langer Bills, creditors and attorneys for creditors would gradually be eliminated from participation. If there is to be a proper administration under the Langer Bills, it would seem that the additional duties devolving upon the United States Attorneys in our larger urban centers would require that their staffs be doubled. All of these costs would fall upon the United States Government.

Bills Contemplate Bureaucratic Administration

Members of the Bar must contemplate with considerable misgivings the philosophy of the proposed legislation. S. 2560 and S. 2561 contemplate a bureaucratic, paternalistic administration of the Bankruptcy Act. S. 2562 and S. 2563 contemplate representation of a favored class of the citizenry, to wit, investors in defunct corporations, by United States Attorneys and at the expense of the taxpayers.[2] This is nothing less than socialized practice of the law. Why should this limited class be entitled to representation at public expense in an effort to recover investments in defunct corporations, investments improvidently made and already lost? S. 2562 and S. 2563 offer free legal aid of a high and specialized character, and not to a class of our society that needs it, but to an investor group. If the Government is to furnish, at Government expense, free legal aid to the investor class, what logic is there for refusing free legal service of all kinds to all our citizens?

The present Bankruptcy Act provides for creditor control[3]. Administration of the Act has been weakest in those jurisdictions where judges and referees have denied creditors the control provided for by the Act. It is assumed that where there is creditor control, there is an incentive to supervise operations, to keep down expenses and to provide as large a fund as possible for distribution. In the limited period during which, in the Southern District of New York, a trust company acted as official trustee, bankruptcy administration was so unsatisfactory that the Supreme Court of the United States felt impelled to enact General Order 14 prohibiting the appointment of official trustees. One weakness of an administration by official trustees was found to be that the interest of the official trustee in one case would conflict with the interest of the same trustee in another case. Such a conflict conceivably might arise under operations under the Langer Bills. United States Attorneys might find themselves in embarrassing situations by reason of the conflicting demands of interested parties in different estates, and in almost every case the claim of the chief client of the United States Attorneys, *i. e.*, the United States Government, is adverse to the interests of general creditors and investors.

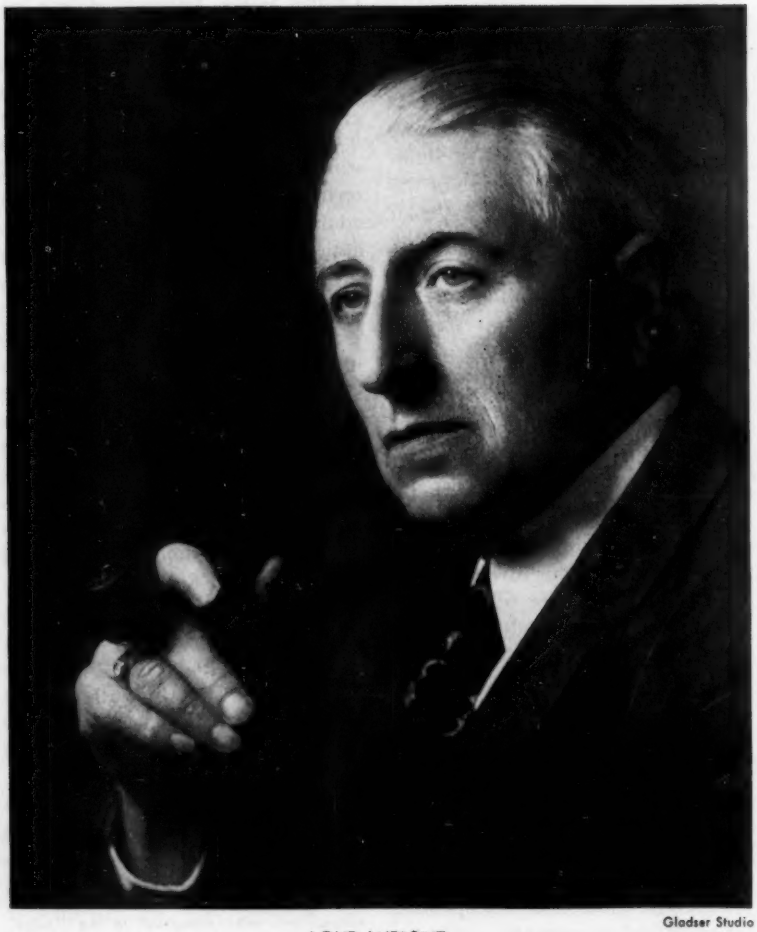
It will not do, however, to dismiss lightly the complaints to which Senator Langer refers. If in certain districts evils in bankruptcy administration exist or should they appear in the future, the machinery should exist for their speedy elimination. It may well be that by statutory enactment or by General Order of the Supreme Court, trustees whose estates are not closed within a specified period should be required to report in writing in detail the reasons for the delay, that copies of such reports should go to the Administrative Office, and that appropriate measures should be provided if the reasons be deemed inadequate. Moreover, in districts where in the opinion of the Administrative Office fees and costs of administration seem unduly high, the Administrative Office might be required to report the facts to the Judicial Conference, and those responsible required to explain. It may well be that these suggested

(Continued on page 434)

2. In view of the fact that the Langer Bills place an unusual emphasis upon the rights of investors, and refer throughout to the "Judge" rather than to the "Court", which latter term would include the Referee as well as the Judge, it is obvious that Senator Langer must have had in mind reorganization cases rather than straight bankruptcies. But his bill is all-inclusive. The aggregate number of corporate reorganization cases filed in the fiscal year 1952-1953 was eighty-six.

3. Creditor control under the Bankruptcy Act is to some extent a limited one. Under Section 2a (17), 11 U.S.C.A. Section 11a(17) and under Section 44, 11 U.S.C.A. Section 72, bankruptcy courts under certain circumstances have a measure of control over the appointment of trustees.

State Delegates Nominate New Officers, Members of Board of Governors



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LOYD WRIGHT

■ Loyd Wright, of Los Angeles, was nominated by the State Delegates to lead the American Bar Association for the year 1954-1955. Since nomination is generally considered tantamount to election, Mr. Wright will take office at the close of the Annual Meeting as the Association's seventy-eighth President.

The State Delegates made the nomination March 9, during the recent Midyear Meeting in Atlanta. At the same time, they nominated John D. Randall, of Cedar Rapids, Iowa, for the office of Chairman of the House of Delegates, and renominated Joseph D. Stecher, of Toledo, Ohio, and Harold H. Bredell, of Indianapolis, Indiana, for the offices of Secretary and Treasurer respectively.

To fill posts on the Board of Governors for three-year terms beginning at the adjournment of the Chicago meeting, they nominated Elwood H. Hettrick, of Boston (First Circuit), Osmer C. Fitts, of Brattleboro, Vermont (Second Circuit), Blakey Helm, of Louisville, Kentucky (Sixth Circuit), and Thomas M. Burgess, of Colorado Springs, Colorado (Tenth Circuit).

Mr. Wright

Mr. Wright is a native Californian, born in San Jacinto on December 24, 1892. He attended public schools in Hemet being graduated from Hemet Union High School in 1910. He received his LL.B. from the University of Southern California in 1915. He is a member of the Southern California Chapter of the Order of the Coif and of Phi Delta Phi.

He has maintained his own offices since he was admitted to the Bar in June, 1915.

He served overseas as a first lieutenant with the 8th Infantry, 8th Division, during World War I.

From 1921 to 1926, he was a lecturer of law at the University of Southern California on the subject of corporate practice. He has engaged in general civil practice since admission. He is a director of several corporations and business concerns,

including Trans World Airlines, States Spring and Bumper Co., the Southern Pipe and Casing Co., Cohn-Goldwater Manufacturing Co., and the Reserve Oil and Gas Co.

Mr. Wright has been very active in the work of the organized Bar. In the Los Angeles Bar Association, he served as Secretary (1928-1936), Vice President (1936-1937) and President (1937-1938). In the State Bar of California, he was a member of the Board of Governors from 1938-1941 and President, 1940-1941.

He has been a sustaining member of the American Bar Association since 1942, a member of the Board of Directors of the American Bar Association Endowment since 1937 and was a member of the Association's Board of Governors from 1946-1949. He has been a member of the House of Delegates since 1940 and an Assembly Delegate since 1949.

Mr. Wright is also a director of the American Judicature Society and of the National Legal Aid Association. He was recently appointed by Vice President Nixon to the Commission on Judicial and Congressional Salaries.

Mr. Wright is married and has four children, two sons and two daughters. His two sons are associated with him in the practice of law.

Mr. Randall

John D. Randall, the nominee for Chairman of the House of Delegates, has been active in organized bar affairs for many years, both nationally and in his home state of Iowa. He has been the State Delegate for Iowa, in the House of Delegates, since 1948. He is a former President of the Linn County Bar Association, and has been active in the affairs of the Iowa State Bar Association. He is a former Chairman of the American Bar Association's Committee on Unauthorized Practice of the Law.

Among other bar activities he has served as a member of the National Conference of Realtors and Lawyers, the National Conference of Lawyers and Representatives of the American Bankers Association, and the National Conference of Lawyers and Life Underwriters. He also is Co-Chairman of the Joint Conference on Professional Responsibility formed in 1952 by the American Bar Association and the Association of American Law Schools.

Mr. Hettrick

Elwood H. Hettrick, the nominee for membership on the Board of Governors from the First Circuit, has been Dean of Boston University Law School since 1942.

A native of Florida, Dean Hettrick is a graduate of Wesleyan University (Middletown, Connecticut), where he received his A.B. in 1932, and of Boston University, which awarded him an LL.B. in 1938.

John W. Barry

JOHN D. RANDALL

Sargent Studio

ELWOOD H. HETTRICK

H. Bryon Nicholson

THOMAS M. BURGESS

Courier-Journal and Louisville Times

BLAKEY HELM

Bachrach

OSMER C. FITTS

He is a member of the American Bar Association, the Boston Bar Association, the Norfolk County Bar Association, the Massachusetts Bar Association and the American Judicature Society.

Mr. Fitts

Osmer C. Fitts, nominated to the Board of Governors for the Second Circuit, was born in Brattleboro, Vermont, on October 21, 1905. Educated in the public schools in Brattleboro and in Worcester Academy, he graduated from Dartmouth College (B.S.) in 1926, and from the Law School of Harvard University (LL.B.) in 1929. He was admitted to the Bar of Vermont and the Bar of Massachusetts in 1929.

A member of the Judge Advocate General's Department of the Army of the United States from 1942 to 1946, he was attached to the office of the Trial Attorneys before the War Department Board of Contract Appeals and was with the Claims Service in the European Theater.

A member of the American Bar Association since 1931, he was State Chairman for the Junior Bar Conference in 1938, from 1938 to 1940 a member of the Bill of Rights Committee, Interim State Delegate in 1938 and, since 1940, continuously a member of the House of Delegates, from 1940 to 1946 from the Vermont Bar Association and as State Delegate from 1946 to the present.

He was President of the Vermont Bar Association 1948-1949, and is a member of the Windham County Bar Association.

Mr. Fitts is a Director of the Judge Advocates Association, a Director and member of the Advisory Council of the New England Law Institute, Inc., and a member of the Board of Regents of the American College of Trial Lawyers. He is also a Director of the American Judicature Society.

Mr. Helm

Blakey Helm, of Louisville, Kentucky, nominated as the new member of the Board of Governors from the Sixth Circuit, was born at Auburn, Kentucky on October 18, 1889. He received his education at Auburn Seminary, Cumberland University, Princeton (A.B. 1910), and the University of Michigan (J.D., 1914).

Admitted to the Kentucky Bar in 1913, he has practiced at Louisville for forty years.

He is a member of the Louisville Bar Association, the Kentucky State Bar Association (Vice President 1921-1922), and served as a Kentucky Commissioner in the National Conference of Commissioners on Uniform State Laws. He was Kentucky's State Delegate in the House of Delegates from 1941-1943 and 1950-1953.

He served in World War I, first as a sergeant and later as a lieutenant in the 164th Infantry. In World War II, he served in the Air Corps, rising to the rank of lieutenant colonel.

Mr. Burgess

The new member of the Board of Governors for the Tenth Circuit, will be Thomas M. Burgess, of Colorado Springs, Colorado.

Mr. Burgess, a native of Colorado, was born June 29, 1903. He attended the University of Colorado (A.B. 1925; LL.B. 1927).

Admitted to the Bar in 1927, he practiced in Denver from 1927 to 1936 when he moved to Colorado Springs.

He served as Vice President of the El Paso County Bar Association (1944-1945), President (1945-1946). From 1946 to 1954, he was a member of the Board of Governors of the Colorado Bar Association, and was President of that Association in 1947-1948. He is a trustee of the Colorado Bar Foundation.

In the American Bar Association, he has been a member of the House of Delegates since 1948.

He is also a member of the American Judicature Society, the Law Club of Denver, the El Paso Club of Colorado Springs (President, 1954-1955), the Colorado Springs Chamber of Commerce, and the American Mining Congress.

Announcement of 1954 Award of Merit Competition

■ The 1954 Awards of Merit will be made to the state and local bar associations reporting the most outstanding activities, other than administrative or routine, initiated or reaching full development since September 1, 1953.

July 15, 1954, is the *final date* for filing entries. Application forms may be secured at the Headquarters of the American Bar Association, 1140 North Dearborn Street, Chicago 10, Illinois.

The Supremacy of the Judiciary:

A Study of Preconstitutional History

by **R. Carter Pittman** • of the Georgia Bar (Dalton)

■ Professor William W. Crosskey's recent two-volume study entitled *Politics and the Constitution* was reviewed in the April issue of the *Journal*. Mr. Pittman's article, sets forth further comment on Professor Crosskey's work, particularly with respect to Mr. Crosskey's views on judicial supremacy.

■ We have become so accustomed to accepting the federal judiciary as the final arbiter on all great issues arising under the Constitution, which sets up this department as a co-ordinate and independent branch of the Government, that it comes as a distinct shock at this late date to encounter the view that this concept has been all wrong from the beginning and has been embalmed in one hundred fifty years of erroneous Supreme Court decisions.

This view, among numerous others equally startling, is asserted by Professor William W. Crosskey in a recent work on the Constitution.[1]

He says (page 938):

> The accepted theory, which is supposed to justify the Court's behavior in this field, is that the Court was created to be the supreme and peculiar guardian of the Constitution; and that, among its other duties in that behalf, it was intended to be the special protector of the people, against their legislatures, state and national; and, still more important, the special protector of the separate states, as against Congress. This view of the Court's intended place in our constitutional system is easily shown to be imaginary.

The Professor attempts[2] to prove that judicial supremacy is an unfounded usurpation insofar as congressional powers may be concerned. He discusses *nine* preconstitutional state cases upholding judicial supremacy and concludes that they are not respectable precedents for judicial supremacy. After his blast at the *nine* precedents, compressed into the *nine* years between 1778 and 1787, he then evaluates American judicial history as follows:

> Such, then, are the pre-constitutional state precedents for judicial review. In large part imaginary, they are, as a whole, unimpressive as a basis upon which to infer that the right of judicial review was considered generally, in the states of America, to be a normal and usual incident of "Judicial Power" when the Constitution of the United States was put together. Instead, they show that the right, everywhere it had been claimed, was a disputed right; it had been claimed in only a few of the states; and it was nowhere firmly established.

At the end of Chapter 28 he says:

> So, taking into account all the several kinds of evidence thus far examined, the situation seems very clear; judicial review was not meant to be provided generally in the Constitution, as to acts of Congress, though it was meant to be provided generally as to the acts of the states, and a limited right likewise was intended to be given to the Court, even as against Congress, to preserve its own judiciary prerogative intact.

At the end of his Chapter 29 he says:

> . . . as suggested at various earlier points, the men who framed our government considered that, by making the Court the nation's judicial head, they were putting it into a strategic position where it could constantly be on the alert to defend all those *rights of the nation, against the states*, which they so carefully provided in the Constitution.

Professor Crosskey's most distinct

1. *Politics and the Constitution in the History of the United States*. Chicago: The University of Chicago Press, 1953, two volumes, 1410 pages. In his preface he says that the funds for his research were "supplied by the then Chancellor of the University of Chicago, Robert M. Hutchins, from moneys in his charge for the promotion of research. Somewhat earlier, I also had some funds from Wilber G. Katz, then Dean of the Law School of the University, which he made available from moneys similarly at his disposal." He claims to have engaged "in 15 years of unremitting research".

2. Chapters 27, 28 and 29. Professor Crosskey says (page 942) "If the men of the Convention believed that, by so constituting and limiting the authority of Congress, they were also providing for judicial review of that body's acts, it must have been because this right of judicial review was then already established in American opinion and practice, as a normal and usual incident of 'judicial Power' under written constitutions wherein the legislative authority was limited." There the Professor should have planted a flag. That was about his nearest approach to the kingdom of truth in his quixotic pilgrimage of fifteen years.

contribution to the literature of the Constitution is the concentration of our preconstitutional judicial history into *nine* years.[3] Many others of late years have unnecessarily burdened themselves with two extra years so as to embrace July 4, 1776.

Just as we were about to become reconciled to writings by modern "experts" that teach us to ignore 156 years of American history, we must now add two years to the void so as to make it 158. Of course, the more we add to the *hiatus* the less we revere our constitutions, our institutions, our traditions and our heritage of liberty under law. Needless to say, had Professor Crosskey peeped behind the synthetic and self-drawn curtain that concealed from him our judicial history back of 1778, a faint trace of manly shame might well have induced him to use that part of his manuscript to kindle a flame for most of that which remained.

One of the characters Professor Crosskey would have been shocked to meet behind the curtain is Chief Justice Lewis Morris of New York, father of Chief Justice Robert Hunter Morris, who lost his good behavior tenure in New Jersey in 1762 when Governor Hardy fell at the stroke of a ministerial pen for granting such tenure, and of Lewis Morris II, who engaged Andrew Hamilton to defend John Peter Zenger, "the poor printer". More important, he was the grandfather of Lewis Morris III, a signer of the Declaration of Independence, and of Gouverneur Morris, the principal author of the judiciary provisions of the Constitution. Apparently Professor Crosskey never heard of the case of *Cosby* v. *Van Dam* (New York, 1733) in which Chief Justice Morris upheld judicial supremacy and used a colonial constitution to "rub out" a "Court of Exchequer with an equity side", created by the proclamation of Governor Cosby.

Since Gouverneur Morris was the legitimate "father" of the judiciary provisions of our Constitution, Chief Justice Morris may be justly described as the "great-grandfather" of those provisions. After his removal from office by Governor Cosby, as a result of his decision, it was he who wrote the "libel" published by Zenger that precipitated the famous *Peter Zenger* case. It was the *Van Dam* case that ended *"courts of exchequer with an equity side"* forever in New York and through the agency of Andrew Hamilton, Zenger's lawyer, ended courts of chancery forever in Pennsylvania.[4]

The "constitution" supported by the decision of Chief Justice Morris against the assaults of executive power was the charter of the Colony of New York. The colonists universally maintained that their charters were their constitutions and that the rights, liberties and freedoms granted or confirmed by their charters could not be diminished, alienated or violated by kings, Parliament, governors or assemblies. Without substantial exception *all of the colonial charters guaranteed to those who left the Old World to people America the "rights of Englishmen"*. The colonists were never able to understand the specious distinctions between the "rights of Englishmen" living in Yorkshire, and the "rights of Englishmen" living in Boston. However, "liberal" ministers of executive power were never at a loss to find reasons for making a mockery of the "fiction" that kings might not recapture that which they had solemnly granted in compacts. "Divine right" brooked no impediments.

Native Englishmen were shielded from the "divine right" or prerogative of kings by the Magna Charta, the Petition of Right, the *Habeas Corpus* Act, the Bill of Rights and the Act of Settlement, but English kings were advised that the royal prerogative to govern English subjects in territories or colonies by proclamation, commissions and instructions was not fenced in, even by charters solemnly granted. That theory of government, was perverted in large part from Roman law, history and practice applicable to "conquered" provinces and an alien people. The colonists asserted, in terms so clear a fool could understand, that they were not "conquered", and if America was a "conquered" country, they were the descendants of the *conquerors*—not the *conquered*. But no position could be made clear enough to arrest the march of power and prerogative. Efforts of colonial assemblies to reenact the Magna Charta, the principles of the Petition and Bill of Rights, the *Habeas Corpus* Act and the Act of Settlement were always disallowed by the king as "trenching upon prerogative".[5]

One need only examine at random any one of the many colonial protests or remonstrances preceding the American Revolution to discover that the colonists were merely insisting upon their constitutional "rights of Englishmen"—no more and no less.

The Stamp Act, passed by Parliament on March 22, 1765 (5 Geo. III, c. 12), deprived the American colonists of the immemorial and inalienable "rights of Englishmen", in that it imposed taxes upon the colonists without their consent or the consent of their elected representatives. Inferior court judges in many of the colonies held courts without stamped papers in the teeth of that Act. To do so they had to hold it to be "unconstitutional". We quote from one of many. It was a declaratory judgment of the County Court of Northhampton County, Virginia, decided on February 11, 1766:[6]

> . . . the court unanimously declared it to be their opinion that the said Act did not bind, affect or concern the inhabitants of this colony, inasmuch as

3. He suggests in a single sentence in a thirty-seven page chapter that there was also "some evidence" in the colonial period not, however, "of much importance" (page 943).

4. See Morris's fifteen-page opinion as published by Peter Zenger in Smith Street 1733. N.Y.P.L.; See also 6 *Doc. Relating to Colonial History*, N.Y. 4, *et seq*; Rutherford, *John Peter Zenger* (1941) 197; 1 *Documentary History of New York*, 754; Pownall, *Administration of the Colonies* 75; *Courts of Chancery in Province of Pennsylvania*, 1720-1735 (1941) 13; 4 *Colonial Records of Pennsylvania*, page 36, *et seq*.

5. 3 *Documents Relative to the Colonial History of New York*, 357; Russell, *Review of Colonial Legislation*, 140; Pittman, "Emancipated Judiciary in America" and citations, 37 A.B.A.J. 485, *et seq*., 585, *et seq*.

6. *Virginia Gazette* (P. & D.) March 21, 1766.

> they conceive the same to be *unconstitutional*, and the said several officers may proceed to the execution of their offices without incurring any penalties by means thereof; which opinion the court doth order to be recorded.

The infamous Townshend Act, passed by Parliament in the seventh year of the reign of George III, authorized and commanded the issuance of writs of assistance by colonial courts, differing in form and substance from the general warrants that courts of exchequer were authorized to issue in England.[7] In England, for example, such warrants were limited to daylight hours. Those fashioned for the colonies under the Townshend Act authorized breaking and entering and searches and seizures in the night-time. Thus the colonists were in that particular, among others, subjected to an odious distinction and divested of one of their constitutional "rights of Englishmen".

As writs of assistance were to be granted by colonial supreme court judges on the *ex parte* application of his majesty's attorneys general in the colonies, questions of constitutionality arose at the very threshold.

An odious distinction had been made between English judges and American colonial judges whereby the former were independent and the latter were on lead-strings from the king.[8] By the free exercise of the king's power to disallow colonial assembly acts granting good behavior tenure to colonial judges, the colonists were deprived of the benefit of the Act of Settlement of 1701. It was thought therefore by the ministry that the latter would issue any writ commanded by Parliament. The courage and virtue of American judges was grossly underestimated.

George III Sought To Destroy Independence of Judiciary

In the appendix to Quincy's Reports is an article by Horace Gray, Jr., (later Justice Gray of the Supreme Court of the United States) in which he discussed some of the decisions of the supreme courts of the American colonies that held writs of assistance to be unconstitutional. Gray tells how judicial independence and judicial supremacy were sought to be destroyed by George III and the minions of his power, by converting the courageous judges of the colonies into mere tools of ministerial power.

At page 540, he said:

> The remedy adopted by the colonies was to throw off the yoke of Parliament; to confer on the judiciary the power to declare unconstitutional statutes void; to declare general warrants unconstitutional in express terms, and thus to put an end here to general Writs of Assistance.

The Era of the American Revolution (N.Y. 1939), carries a thirty-five-page thesis by O. M. Dickerson, entitled *Writs of Assistance as a Cause of the Revolution,*[9] in which he discusses numerous cases decided in the colonies between 1768 and 1774 in which our *supreme* courts held the Act of the 7 George III c. 46, directing the supreme courts of America to grant writs of assistance, to be unconstitutional. It is there revealed that, of the thirteen original colonies, only Massachusetts and New Hampshire furnished the judicial tools for breaking into the cottages and castles of our forefathers in the night-time.

James Otis has the rare distinction of being about the only American colonial lawyer ever to lose a writs of assistance case before 1773. Connecticut, Rhode Island, New York, Pennsylvania, Maryland, Georgia, South Carolina and Virginia *supreme* courts refused, repeatedly, to grant writs of assistance because such writs were *unconstitutional*. The ancient American principle of judicial supremacy extended beyond the original thirteen colonies into East Florida. There Judge William Drayton (not William Henry Drayton mentioned below) held such writs to be unconstitutional and hence joined the host of courageous American colonial judges who were reduced to private station.

Had Professor Crosskey devoted some small portion of his fifteen years of research to a study of our judicial records during the six years between 1768 and 1774, he would have found numerous "pre-constitutional precedents" for colonial *supreme* courts that justified their name and existence by holding an act of Parliament to be unconstitutional. Those cases are not lost to the literature of the Constitution. They are only lost to those who hold a penny before the eye and obscure the sun.

After George III removed Judge Rawlins Lowndes from the Supreme Court of South Carolina in 1772, for holding writs of assistance to be unconstitutional, William Henry Drayton, one of his associates, in deep resentment, made a blistering attack on George III in "The American Claim of Rights", in 1774, for displacing judicial towers and replacing them with judicial tools "who depended upon the smiles of the crown for their daily bread". That

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7. There were no "courts of exchequer" in America. Our forefathers did not so soon forget the *Van Dam* case.
8. Pittman, "Emancipated Judiciary", *supra*.
9. Page 40, *et seq.*

twenty-nine-page document might well have deserved examination.[10]

The records of many of the American colonial cases must yet lie under the dust of two centuries in basements and attics in America, untouched by hands of subsidized "experts" who sometimes try so hard to make us forget all that is honorable in our history in order to induce us to reverse the process of historical evolution.

The records of the Board of Custom Commissioners of England have been transcribed and are to be found in the Library of Congress designated "Treasury I". Bundles 491 through 501 are a veritable mine of materials for any man willing to search for and follow truth wherever it may lead. In a few hours of fumbling midst those "Bundles", one may readily learn what Patrick Henry meant, in the Virginia Ratifying Convention of 1788, while speaking against the "paper on the table", because it didn't make federal judges independent enough, when he said:[11]

> I take it as the highest encomium on this country, that the Acts of the legislature, if unconstitutional, are liable to be opposed by the judiciary.

When one examines the "preconstitutional" constitutions that were framed in the American states between the time of South Carolina's Constitution in March, 1776, and that of New Hampshire in 1784, one finds that ten of those constitutions took judges off the executive team and put them behind the plate as impartial umpires to call the strikes as they saw them in governments of law. Only Georgia put them on the legislative team as they were in Rhode Island and Connecticut under their colonial charters.

Georgia's judicial mouse soon labored to bring forth a mountain whose lofty peak still stands forth in her Constitution as one of history's finest monuments to a revulsion against the very thing Professor Crosskey now advocates:[12]

> Legislative acts in violation of this Constitition, or the Constitution of the United States, are void, and the judiciary shall so declare them.

In "pre-constitutional" 1785, Gouverneur Morris commented that without judicial supremacy "the time employed in framing a bill of rights and form of government was merely thrown away".[13] That which springs from the hearthstones of our fathers may also spring from our hearts.

The distinctly American principle of judicial supremacy, which enables judicial power to stop arbitrary governmental power in its tracks, was so well settled and so well cherished before the American Revolution that the embodiment of that principle in our revolutionary constitutions of government came as a matter of course. A few insignificant delegates opposed judicial supremacy in Philadelphia, but not one denied its existence.[14]

On June 8, 1789, James Madison, on the floor of Congress, and with respect to the proposed Bill of Rights, said:

> If they are incorporated into the constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the executive or legislative; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the Declaration of Rights.

Remembering that, we were induced to examine Professor Crosskey's commentary on our Bill of Rights which, among other things, the emancipated judiciary was created to protect. We were not surprised to find[15] that he seeks to demonstrate how ridiculous it was that the Constitution should have been burdened with the first nine amendments, but not the tenth which he astutely reverses in meaning. He points out clearly, to himself alone, that there was no need of a Bill of Rights; that the Constitution had no defects and that the Bill of Rights

> was a consequence, rather, of the immoderate and highly mendacious opposition to the proposed new government, which had been offered by the state-politician class, during the ratification campaign. The motive of the state politicians, it is well to remember, was their own selfish interest in the existing system. . . .

Indeed, "it is well to remember" many of Professor Crosskey's words and phrases!

With great vehemence he pours it on the "state-politician class" who sponsored a Bill of Rights that was "vicious, rather than beneficial, in effect".[16] Human liberty, he says, needed no Bill of Rights. All it needed was "cultural support". He says:[17]

> The allaying of the fears of this ignorant and credulous group, as to the safety of liberty, was the only real purpose the first nine amendments had. The state-politician group was recognized to be beyond all possibility of satisfaction.

Who were some of those that belonged to the "state-politician class"? Who furnished the "highly mendacious opposition" to the proposed new government that had sanctioned human slavery and omitted the rights of men?

George Mason—Champion of Liberty

The acknowledged "opposition" leader and father of our Bill of Rights was George Mason, of Virginia—history's grand champion of the liberty and dignity of men. He was the original draftsman of the proposed amendments from which eight of "the first nine amendments" were copied with a great degree of faithfulness to details. He went to Williamsburg in May, 1776, with a Declaration of Rights for Virginia in his pocket that has revolutionized a world. Franklin, Adams and Jefferson saw it in manuscript in the possession of Richard Henry Lee and

10. Gibbes, *Documentary History of the American Revolution*, Volume 1, pages 11-39. For that attack Drayton himself was removed from his judgeship. *Ibid*, pages 39-82.
NOTE: Drayton got "even" in his charge to a grand jury at Charleston in April, 1776. Much of it was used by Jefferson in writing the Declaration of Independence. *Ibid*. 273-292; *Manuscripts*, Volume 6, Page 46.
11. Elliott Debates, Volume 3, page 325.
12. Article 1, §IV, Paragraph 11, Georgia Constitution 1945.
13. Sparks, *Life of Gouverneur Morris*, page 438.
14. Charles Warren, *Congress, the Constitution and the Supreme Court*, page 151.
15. Volume 1, page 676.
16. *Ibid*. 677.
17. *Ibid*. 678.

later in newspapers. They embodied the first three paragraphs of it into the Preamble to the Declaration of Independence. Franklin and Adams copied practically all of it into their Declaration of Rights for Pennsylvania (1776) and Massachusetts (1780).

He was in the Constitutional Convention in Philadelphia every hour of every day, fighting for the rights of men over power. At the end he refused to sign a paper that had no Bill of Rights and that sanctioned human slavery. The first six words of his "objections" were heard on every frontier and in every hovel of America: *"There is no declaration of rights"!* He carried his deathless struggle for a Bill of Rights to the people and to the floor of the Richmond Ratifying Convention and wrote the proposed amendments adopted there. Thereafter he retired to his home at Gunston Hall, broken in health and in spirit.

Gout and gallstones had forced upon him a cloistered life from early manhood. He hated public office. During the Revolution he refused to go to the Continental Congress, though publicly implored to do so by a Virginia governor whose cheeks were wet with tears. Except to fulfill an urgent public duty and to render some great public service, as a trust, he could never be dragged from his home and his motherless children. When appointed and commissioned as United States Senator from Virginia in the new government, he returned the commission with courteous thanks. He lived barely long enough to see his Bill of Rights adopted. Then came death and oblivion.

When George Mason's will, drawn in 1773, was probated after his death in 1792, the newspapers all over America carried a provision of that will which mirrored the man:

> I recommend it to my sons from my own experience in life, to prefer the happiness of independence and a private station to the troubles and vexation of publick business, but if either their own inclinations or the necessity of the times should engage them in public affairs, I charge them on a father's blessing never to let the motives of private interest or ambition induce them to betray, nor the terrors of poverty and disgrace, or the fear of danger or of death, deter them from asserting the liberty of their country and endeavoring to transmit to their posterity those sacred rights to which themselves were born.

Such was the man, zealous to have independent courts protect the declared basic liberties of the people, whom Professor Crosskey describes as "highly mendacious", who belonged to the "state-politican class", and whose "constant repetition" of "unfounded charges" forced upon our forefathers a useless and dangerous Bill of Rights in order to allay the fears of an "ignorant and credulous group as to the safety of liberty"!

That which Professor Crosskey said about George Mason is just about as accurate as most everything else he said in his juvenile work which he so boastfully describes as "a bombshell to traditional historians" that "remakes history".[18]

Professor Crosskey's theory that limitless legislative powers, unrestrained by emancipated courts, can be reconciled with liberty and dignity in men has been tried and found wanting a thousand times. The sea of history is strewn with flotsam and jetsam from the derelicts that have crashed on that rock. *The gold at the end of Professor Crosskey's rainbow is in the mines of Siberia!*

When judicial supremacy is destroyed, liberty will be at an end in America today as it was in 1774. That principle of government is America's cardinal contribution to the science of government. It distinguishes the American Constitution from the Russian Constitution. Judicial supremacy accounts for the fact that ours is the oldest written constitution in the world today. Those constitutions in the history of the world that did not insure judicial supremacy and independence have had an average life expectancy about equal to that of a dog.

18. See the publisher's flaps.

Salary Commission Recommends Substantial Increases in Judicial and Congressional Salaries

▪ Substantial increases in the compensation paid to federal justices, judges and members of the Congress were recommended by the Commission on Judicial and Congressional Salaries in a report submitted on January 15, 1954, to President Eisenhower, Chief Justice Warren, Vice President Nixon, and Speaker of the House Martin.

The Commission was established pursuant to Public Law 220, 83d Congress, approved August 7, 1953. It was directed by Congress "to determine the appropriate rates of salaries for justices and judges of Courts of the United States and for the Vice President, the Speaker of the House of Representatives, and Members of Congress in order to provide fair and reasonable compensation to such officials". It further was directed to report its findings on or before January 15, 1954, to the President, the Chief Justice, President of the Senate and Speaker of the House of Representatives.

The report indicates that a few commissioners believed that the compensation paid to these officials should be $2500 higher and a few thought it should be $2500 lower than the $27,500 per annum recommended.

The American Bar Association, through Morris B. Mitchell, of Minneapolis, Minnesota, Chairman of the Committee on Judicial Selection, Tenure, and Compensation, worked closely with the Commission throughout its consideration of this important subject. Mr. Mitchell organized a team of trial counsel to assist the Commission with its public hearings.

Presidential Power and Aggression Abroad:

A Constitutional Dilemma

by William W. Schwarzer and Robert R. Wood • of the California Bar (San Francisco)

■ Although the constitutional power to declare war is vested in Congress, congressional declarations have had surprisingly little to do in the past with committing our Armed Forces to actions that look and sound very much like war. The President is the Commander in Chief of the Army and Navy, and most of the hostilities we have engaged in have actually begun before any formal action of the legislative branch.

■ If Russian troops should suddenly invade Norway, the universal question would be: What will America do? All members of NATO, including Norway, have received the solemn pledge of the United States that an attack on one would be regarded as an attack on all. Each member of NATO vowed to assist the nation attacked by taking forthwith such action as it deemed necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area.[1]

What action does American governmental machinery permit in such an event? Normally the President is the one to decide what military measures are necessary. Suppose he decides that the safety of America depends upon immediate military action to prevent strategic Norwegian bases from falling into Russian hands. Suppose he decides that the safety of America depends on instant massive retaliation. Still, crisis or not, he must consider a further problem: What does the Constitution authorize the President to do under the circumstances? Oddly enough, this vital question of constitutional law is fraught with such doubt and difficulty that the foremost legal authorities reach opposite conclusions.

This problem—the constitutional power of the President to send troops into action abroad—may confront us anywhere, anytime in our troubled world. It has arisen in the past, as in the Boxer Rebellion of 1900, but was not seriously debated until after President Truman had sent our troops to fight the North Koreans. The issue of the debate, of course, was whether the President should have waited to let Congress vote on what measures were to be taken against the North Koreans, who meanwhile were sweeping southward.

The great constitutional question stems from the division of the war power by the Founding Fathers between Congress and the President. The framers of the Constitution, with the hated prerogatives of George III in mind, did not want the new republic's Chief Executive to possess the grave power of choosing between war and peace. Congress, instead, would "declare" war and the President was made Commander in Chief of the Army and Navy to act as the nation's first general and admiral. Thomas Jefferson thought that "we have already given . . . one effectual check to the dog of war, by transferring the power of letting him loose . . . from those who are to spend to those who are to pay".[2]

Originally the framers had given Congress the power to "make" war. But even in 1787, war could come too fast for Congress to act to defend the nation, and a change was made to give Congress the power to "declare" war in order to remove any doubts that the President could "make" war in defense of the nation.[3] In the twenty-third of *The Federalist* papers, Alexander Hamilton justified this change by maintaining that the circumstances that endangered the safety of nations were infinite and no constitutional shackles could wisely be imposed on the President's power of defense; that it was impossible to foresee the extent and variety of means that would be necessary to insure adequate defense in the future. Hamilton's authoritative interpretation of the Constitution demonstrates the great foresight and

1. The North Atlantic Treaty, Article V, 63 Stat. pt. 2, page 2244.

2. Quoted in Warren, *The Making of the Constitution* (1928), 481 note 1.

3. 2 Farrand, *Records of the Federal Convention of 1787* (1911), 318.

statesmanship of our Founding Fathers.[4]

But the Founding Fathers could not foresee supersonic aircraft and hydrogen bombs which today raise the momentous constitutional question: When is American resistance to aggression abroad "war" which Congress must declare and when is it "defense" which the President may undertake? An attack on Hawaii clearly permits the President to plunge the nation into all-out mobilization and to commit its Armed Forces to action. But what about an attack on Canada, or on Cuba, or on Indo-China or on Norway? Are these, too, the ramparts of our defense?

An attack on any of these nations would confront the United States with a national emergency but the degree of its seriousness would vary with each case. Who is to decide the question of degree, the question whether the emergency is serious enough to justify presidential action? The United States Supreme Court in the Steel Seizure case held that the President may not enlarge his powers at the expense of Congress by simply deciding that a national emergency exists.[5] When President Polk seemed to do just that by dispatching American troops into Mexico, Abraham Lincoln scoffed:[6]

> If today he should choose to say he thinks it necessary to invade Canada to prevent the British from invading us, how could you stop him? You may say to him, "I see no probability of the British invading us," but he will say to you, "Be silent; I see it, if you don't."

It may be significant that when Lincoln later assumed the awful responsibility of defending the nation, he thought it necessary to assume unprecedented — even dictatorial — powers for the first three months following the fall of Fort Sumter.

In deciding what to do in the event of an attack on a country such as Norway, the President must examine with deep insight this nation's history and its principles of government. It is our thesis that these will provide constitutional means for taking military action when sudden swift aggression makes it imperative.

A survey of American wars shows, surprisingly, that congressional declarations of war have had little or nothing to do with committing this nation's Armed Forces. Only the War of 1812 followed congressional debate culminating in a declaration of war. In every other instance Congress followed presidential leadership by declaring war or supporting undeclared war such as the naval war against France in 1798, the Barbary wars in 1801 and 1815, the Mexican hostilities from 1914 to 1916, and the Korean war. Although a declaration of war has a major legal significance in our relations with enemy nations and as a basis for emergency legislation, it has had little to do with "letting loose the dog of war".[7]

Over a hundred times the President has sent American forces abroad into action too limited to be called war.[8] In Latin-America, the Philippines, Japan, China, Russia and other countries these forces have been used to guard American lives and property. At times the President has acted similarly to enforce international obligations or to protect the intangible interests of the United States. The occupation of Haiti, the assumption of control over the Canal Zone, President Monroe's declaration of the Western Hemisphere's territorial integrity, the destroyers-for-bases deal—all were examples of how Presidents have unilaterally committed American military force in the interest of national security as they saw it.

It is also relevant here that the Constitution makes the President the Chief Executive, the chief enforcement officer of the nation's laws. This presidential function affects our problem in two ways. In the first place we have since the end of World War II built a formidable network of collective security treaties covering most of the free world. The outstanding example is the North Atlantic Treaty in which the signatory powers "agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all".[9] While the Senate in ratifying this treaty did not intend to relinquish the congressional power to declare war—even if it could have done so—this treaty certainly imposes a legal obligation on the President in the event of an armed attack on a member nation. Being the law of the land, it would require him to enforce it by such action as the Constitution authorizes. Secondly there exists today something in the nature of an international common law by which aggressive war is made illegal. Over a period of centuries the collective morality of the peoples of the world has crystallized into such legal forms as the Kellogg-Briand Pact outlawing war and the recent trials of war criminals. There is increasing recognition today of a civilized nation's duty to act as a citizen policeman in defending society against aggressive war. This principle has found expression in the Charter and the conduct of the United Nations.[10]

The President's role cannot, of course, be conclusively defined by international law and the course of history. Neither the development of

4. For a recent statement, see Mr. Justice Jackson, concurring, in *Youngstown Sheet & Tube Co., et al. v. Sawyer*, 343 U.S. 579, 645 (1952); see also *id.* at page 659.

5. *Youngstown Sheet & Tube Co., et al. v. Sawyer*, 343 U.S. 579 (1952).

6. Quoted in Taft, *A Foreign Policy for Americans* (1951), 29.

7. A concise survey of Congress' use of its power to declare war is found in Rogers, *World Policing and the Constitution* (1945), 45-55.

8. Rogers, *supra*, cites 148 instances; 76 instances are listed in Offutt, *The Protection of Citizens Abroad by the Armed Forces of the United States* (1928). The difference seems due to different criteria of selection.

9. The North Atlantic Treaty, Article V, 63 Stat. pt. 2, page 2244.

10. A discussion of the status of war in modern international law is found in Jessup, "Force Under a Modern Law", 25 *Foreign Affairs* 90 (October, 1946). The Senate Committee on Foreign Affairs and the House Committee on Foreign Relations, in approving the United Nations Participation Act of 1945, both stated that American participation in international policing under Article 43 of the U.N. Charter would not be "war" in the constitutional sense which requires a declaration by Congress. Sen. Rep. No. 717, page 8, and H. R. Rep. No. 1383, page 8, 79th Cong., 1st Sess. (1945). An authoritative contrary view is expressed in Borchard, "The Charter and the Constitution," 39 *Am. J. Intl. L.* 767 (1945).

international morality nor the assumption of international obligations can alter the distribution of power in American government. Neither the jetplane, the atom bomb nor the peril of friends abroad is capable of amending our Constitution. Yet the essential truth remains that the Constitution was not drafted as a statute to deal with the problems of Hamilton's and Jefferson's day but as an enduring charter of government.

The system of government bequeathed to us is, like all democratic institutions, a compromise. The Founding Fathers divided the power to conduct our foreign affairs, in peace as in war, between Congress and the President. Since that day, the demands of responsible democratic government have had to be adjusted to the moment's needs for prompt and resolute action. The accumulated experience of history has therefore put a gloss on the constitutional framework.[11] Unilateral presidential action within certain spheres has become a part of constitutional government. Even in the legislative branch power and responsibility have crystallized in committees and chairmen.

What would a President, confronted with a sudden attack on a friendly nation abroad, face when he turns to Congress for authority to take action? Even if a majority were willing to follow his leadership and accept his judgment based on information and experience not immediately available to Congress, there would undoubtedly be an intelligent and powerful minority that should and would be heard. The probable debate between representatives from rural and interior constituencies and those from areas more responsive to events abroad might cost strategic days and hours.

Against the delays of congressional debate must be weighed the organization, the skill and the information of the executive branch which make it peculiarly qualified to act when quick action is needed. But presidential power to act depends on the existence of a sufficiently grave emergency and, as we have seen, it is not within his power to determine that such an emergency exists.

Kee Coleman Studios

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Yet it is clear that the President, sworn to defend the nation and the Constitution, cannot refuse to act when national security is threatened.[12] An attack on New York would raise no question respecting his constitutional powers. An attack on Canada or Cuba would raise very little question. An attack on a European ally would have this in common with an attack on or near this country—it would impose on the President the same duty to exercise his best judgment on the matter of the defense of this country. The President, after all, is elected as much for his ability to exercise his judgment and make decisions for the nation as for his ability to carry out the mandate of Congress. If his judgment dictates that the safety of the country is threatened and that quick action is needed to eventually save American lives, it is his duty to take appropriate action immediately whether the attack is against American territory or not.

Many times in our early history, the President or his executive officers have had to act in the best interests of the nation when there was no time to go to Congress for authority.[13] The ultimate legality of their conduct depended on eventual congressional approval but this did not diminish their duty to act when circumstances demanded action. Jefferson's purchase of the Louisiana territory is an example. A firm believer in a weak executive, he nevertheless felt that it was his duty to secure to the American people the immeasurable benefits accruing from the purchase regardless of his doubts respecting his power to act.[14] Congress subsequently approved his action and history vindicated his judgment. There are other occasions on which executive officers have had to act promptly to spend money, dis-

11. See Mr. Justice Frankfurter, concurring, in *Youngstown Sheet & Tube Co., et al. v. Sawyer*, 343 U.S. 579, 610 (1952).

12. See *The Prize Cases*, 67 U.S. 635, 668 (1862). (The Court states, however, that the President does not have the power to "initiate" war).

13. See Wilmerding, "The President and the Law", *67 Pol. Sci. Q.* 321 (September, 1952).

14. Interesting examples of Jefferson's thinking in connection with the President's power and duty to act in emergencies are found in Franklin, "War Powers of the President: An Historical Justification of Mr. Roosevelt's Message of September 7, 1942", 17 *Tulane L. Rev.* 217, 231-240 (1942).

tribute supplies or suspend habeas corpus and ask congressional approval only afterward.

When the President's duty to act in the defense of the best interests of the country as they appear to him is viewed in the light of the historic development of his office and of the international obligations which the nation has assumed, some of the doubts surrounding his power to resist aggression abroad disappear. If imperious circumstances demand action, it is not the President's duty to refuse to act while awaiting specific authority from Congress. Aware of the electorate's confidence in his judgment, he must proceed to exercise it in the realization that Congress must eventually be asked to supply the authority which he may lack at the time he takes the action he considers imperative. Faced with an attack on Norway, for example, the President may well conclude, especially in view of the Senate's recognition of Norway's strategic importance by the North Atlantic Treaty, that immediate military intervention is imperative. An attack on other countries with whom we may have different ties or none at all may equally lead him to determine that immediate intervention by our Armed Forces is needed, and he must then act accordingly and submit his decision to Congress as soon as time permits. Congress retains the ultimate power to overrule the President's decision by withholding funds or by refusing to declare war. Admittedly it would not be easy for Congress to extricate the country from a war in progress but this risk is outweighed by the dangers of inaction in time of peril. And even if Congress should fail to back a President's decision, he will have been no more delinquent in the performance of his constitutional duty than if he had permitted the nation to be thrown into mortal peril by refusing to take action.

National Conference of Bar Presidents

▪ The seventh meeting of the National Conference of Bar Presidents was held at the Atlanta Biltmore Hotel, Atlanta, Georgia, on Sunday, March 7, 1954. Considering the geographical location of Atlanta, the meeting was unusually well attended. The total registration was ninety-four—representing fifty bar associations and thirty-two states. We were pleased to have two representatives who traveled all the way from Hawaii.

Confined as we were to a one-day session, our program was rather congested and unfortunately little time was left for question-box periods and general discussion. We were addressed by several bar presidents who discussed "Significant Undertakings and Accomplishments of Our Bar Association". These were Glenn R. Jack, President of the Oregon State Bar, Edward A. Dutton, President of the Georgia Bar Association, Edward T. Curry, President of the New Jersey State Bar Association, G. Ellis Gable, President of the Oklahoma Bar Association, Gabriel Hoffenberg, Past President of the Beverly Hills Bar Association, California, Timothy I. McKnight, President of the Illinois State Bar Association, Bettin Stalling, President of the Federal Bar Association and Stanley B. Balbach, Vice Chairman of the Junior Bar Conference of the American Bar Association.

Perhaps the highlight of the Conference was a television show entitled, "The Law Says", put on by the Atlanta Bar Association and the Lawyers Club of Atlanta. This was a departure from the talks we have had on public relations and showed public relations in action.

We were welcomed by an interesting talk by A. Walton Noll, President of the Atlanta Bar Association. We received not only the Southern hospitality which he promised us, but Southern hospitality at its best.

In addition to committee reports, we were addressed by William J. Jameson, President of the American Bar Association; Sidney B. Pfeifer, of Buffalo, New York, President of the Erie County Bar Association; Jo V. Morgan, Judge of Municipal Court, Washington, D. C.; Ross L. Malone, Jr., of Roswell, New Mexico, member of the Board of Governors of the American Bar Association; Joseph B. Miller, chairman of the National Conference of Bar Secretaries; Harry Gershenson, of St. Louis, Missouri, Chairman of the American Bar Association's Section of Bar Activities; Glenn R. Winters, Executive Secretary of The American Judicature Society; E. Smythe Gambrell, Chairman of the American Bar Association's Committee on Regional Meetings; and Allen L. Oliver, Chairman of the Association's Committee on Unemployment and Social Security.

There still seems to be some confusion as to who are members of and who may attend the Conference. I quote from my letter of October 21, 1953: "The Conference is composed of the President of the American Bar Association, the Presidents, Presidents-elect, Vice Presidents, and officers of all state and local bar associations which are represented in the House of Delegates of the American Bar Association and the Presidents of all other local bar associations in the United States as associate members. The past presidents of these associations are also members and constitute a most valued alumni."

Perhaps the most important meeting which this Conference has yet held will be held at the time of the Annual Meeting of the American Bar Association in Chicago on August 16-20, 1954. At that time the new American Bar Center will be dedicated. There will be a meeting of the Conference Council on Saturday morning, August 14. Our alert Vice Chairman, Archibald M. Mull, Jr., of Sacramento, California, will be in charge of the program for the August meeting.

ARTHUR VD. CHAMBERLAIN
Secretary
Rochester, New York

The Taft-Hartley Act:

The Myth of "Union Busting"

by George Rose • of the Indiana Bar (Indianapolis)

■ The leaders of organized labor over and over again have called for repeal or modification of the Taft-Hartley Act. One of the provisions that has caused the most controversy is Section 9(c) (3) which provides that striking employees "not entitled to reinstatement" are not eligible to vote in a representative election. This, say the union spokesmen, permits union busting. Mr. Rose disagrees, and explains why in the following article.

■ Of all the charges hurled by angry labor leaders against the Taft-Hartley Act which seemed to indicate some basic weakness in the law, the loudest were those who claimed that it was a "slave labor" law and that it permitted the employer to "bust" unions. Of course, the "slave labor" accusation died early of its own weight, for it was obvious even to the most innocent that employees who are able to strike freely and to change jobs at will do not come within any of our recognized concepts of either slavery or peonage. The contention that Taft-Hartley is a "union busting" law has continued to linger, appearing in surprising places.

In 1952, Presidential Candidate Eisenhower in a speech[1] said, "I have talked about the Taft-Hartley Act with both labor and industry people. I know the law might be used to break unions. That must be changed. America wants no law licensing union-busting. Neither do I." Someone apparently had sold Mr. Eisenhower a "bill of goods" on "union busting", which, in his unfamiliarity in this field, he had accepted as genuine.

The reference is to Section 9 (c) (3) of the Act, which provides that "Employees on strike who are not entitled to reinstatement shall not be eligible to vote." In other words, if employees go out on strike because their employer will not grant their demands, and during the strike those employees are replaced, if an election is held to determine whom the majority of the employees want to represent them, the employees who have been replaced are not entitled to vote.

Replacing striking workers is not quite as simple as it sounds, as anyone familiar with industrial conditions well knows. Except in a plant employing five or ten employees (and even there it may not be easy), the task of replacing workers with permanent employees during a strike is usually almost impossible. In a plant employing any sizeable contingent, surrounded by a daily picket line, with employees living in residential districts occupied by other workers, subject to the pressures not only of the striking workers but of other union adherents, obtaining new employees willing to face this constant barrage of vilification and hatred requires weeks and months.

Suppose that after a period of time—and it will be two or three months at the least—a full complement is secured, so that the plant is again in full operation, and the employer files a petition for a representation election, in the hope that he can get rid of the union.

The petition will be filed with the National Labor Relations Board regional office, possibly in a city some distance away. Knowing that a strike condition prevails, the Board representatives will not expedite the proceedings, and it will be at least two or three weeks before someone comes to investigate the situation, and talk with the employer, the striking union and the new employees. These conferences can quite validly be spaced over several weeks, because of press of labor board business, meetings in other places or the absence of parties. The striking union will of course demand a hearing, and will secure it. The scheduling of the hearing will obviously consume additional weeks. In view of the inclination of many in

1. Convention of American Federation of Labor, September 17, 1952.

the Board's offices, the hearing will be set for a date four or five months after the commencement of the strike. There can easily be postponements requiring further delays, as well as the problem of securing a hearing room in a small town. A hearing will finally be held, and the matter sent to Washington for determination, with briefs filed by the parties, which will be insisted on by the union. Further extensions of time for the preparation of briefs will be granted. When no more extensions are granted, the time required by the Board to render its determination will be not less than six weeks and probably at least eight. Consequently, by the time the Board directs that an election be held within thirty days, and the arrangements are made for the election (which involves conferences as to payrolls, supervisors and others eligible or ineligible to vote, which may be very complicated and quite bitter), at least six months will have elapsed since the strike began and probably more than eight or nine.

Certainly holding an election seven, eight or nine months after a strike does not come within the ordinary interpretation of "union busting", although the end result may be the same. None of these delays is unusual. We see them too frequently in our courts. The unions may argue that such procrastination will hurt them too, but it will certainly injure the employer by bringing reduced production and interference with deliveries.

The unions contend that during a depression it would be very simple for the employer to take an arbitrary position and refuse a legitimate demand of the union, causing the employees to go out on strike, so that he can quickly replace the strikers with unemployed workers. Under those circumstances, the finding of new employees would be much easier than under present conditions, but the delays that will precede any election will still operate to forestall a hasty ousting of the union, and the time which may run until an election is held can be six or more months, depending upon the ingenuity of the parties. To delay it more, the union might file charges of an unfair labor practice, which would delay an election almost indefinitely.

There is little question that there are still some employers who are opposed to unions on general principles, or will resist the granting of demands that they feel are undemocratic such as the union shop, or the giving of increases which they believe will jeopardize the ability of the business to continue. However, the number of employers who will get rid of their experienced employees, requiring the training of new employees, with the expense and the reduced production that entails, is very small. Employers tend to yield too easily. If there is a sizable number of employees who are opposed to the union, we have a different picture, but even then the average employer will hesitate a long time before stirring up this hornet's nest. Consequently, it is a lurid misrepresentation to call the Act a "union busting" law, unless we are ready to say that it is also an "employer busting" law. This aspect of the law is seldom touched on, but its potentiality for injury to the employer is much greater, and the unions use it for that purpose again and again. When the employees go out on strike to gain something which they have not been able to obtain through collective bargaining, they are testing their economic strength against that of the employer. They usually choose the occasion when they believe the employer will be more easily subjected to pressure which will force him to yield. The gain the union seeks may be a fair one, but it may just as likely be unjustified and unreasonable. Is the employer wrong in refusing to give the union what it seeks? Does the union have a moral right to a pay increase? Some arbitrators seem to decide that way. How is the question to be decided?

Unions have a way of representing an employer who resists their demands, no matter what the demands may be, as being a Simon Legree or something worse, so it isn't difficult to sponsor some sentiment against the employer. The union then goes on strike, supported from the union's strike chest. The strike may continue until the employer is reduced nearly to bankruptcy, or is forced to yield to demands he cannot afford. There is little or nothing that the employer can do about it, since the noble right to strike is protected in Section 13 of the Act, as well as in the federal and state Norris-LaGuardia Acts, unless the union is so ill-advised as to engage in flagrant violence, and the local courts are sensitive to extreme union tactics. Is this conduct the sort which should be protected? Must the employer accept his fate with no recourse but to oppose the strike, or may he mobilize pressure against pressure? Recently the NLRB held that a lockout employed by employers during multiemployer bargaining negotiations to force the union to abandon a strike against one of the employer group was a violation of the Act.[2] The Board also held that an employer may not resort

(Continued on page 407)

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2. Continental Baking Company (1953), 31 LRRM 1640. To the contrary, Davis Furniture Co. N.L.R.B. (1953) 32 LRRM 2305.

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EDITORIAL OFFICES

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■ Regional Meetings

The Association has greatly expanded and increased its usefulness and effectiveness during the last twenty years. One of the most persuasive indications of this may be found in the remarkable development of Regional Meetings.

They were initiated in substance by the Section of Bar Organization Activities and denominated "Conferences" or "Meetings of State Bar Association Executives".

The first of these early meetings appears to have been held in New York City on January 27, 1934. There followed six in 1935—in Boston on January 15; New York City on January 26; Decatur, Illinois, on May 24; Atlantic City on June 1; Springfield, Missouri, on September 28; and Atlanta on November 22 and 23.

During the next two years only two such meetings were convened, both of them in 1936—in Richmond, Virginia, on April 10 and 11, and in Kansas City, Missouri, on October 10.

Kansas City was again chosen in 1938 for the first meeting of that year, held on November 13.

Referring to this assemblage, the JOURNAL of January, 1939, had this to say: "State Bar Association organizations took a historic step . . . when the executive representatives of nine different state associations spent a day in conference on the best method of operating their associations."

These associations responded to invitations sent to all the state organizations in the thirteen states of the Eighth and Tenth Circuits.

The only other meeting held that year was in Columbus, Ohio, on December 11, 1938.

"Bar Association Officials" were called together at Colorado Springs on September 24, 1939, and "Bar Executives" again in Des Moines on November 4 and in Chicago on December 1, both in 1939.

In 1940 four meetings were held, at Louisville, January 27; Atlanta, February 17; New Orleans, March 23; and New York City, April 6. We have a note that seventy-five were in attendance at New Orleans.

Two Meetings occurred in 1941—one in Boston on January 15 and the other in Denver on February 27.

The June, 1942, issue of the JOURNAL carried this important report:

> The six regional meetings, sponsored by the Section of Bar Organization Activities, which this year have brought to key members of state and local associations the war-work program of the organized bar, concluded with an all-day meeting on May 16 of representatives of associations in the Eastern Seaboard States. The Meeting was held at the Association of the Bar of the City of New York. The meeting followed the general pattern of its predecessors at which . . . the year's major efforts of the American Bar Association have been presented.

At the Annual Meeting that year, 1942, Regional Meetings were authorized to be continued and expanded.

The six referred to in the JOURNAL were as follows: Raleigh, North Carolina, January 16; Jacksonville, Florida, January 17; Milwaukee, February 27; Dallas, March 27 and 28; Kansas City, Missouri, April 18; and New York City, May 16.

Once more in the same year a meeting was called, again in New York, on December 7 and 8. It was called a War Regional Meeting. The attendance was about 600.

Two similar meetings were held in 1943 and 1944, the first in Birmingham, Alabama, December 9 and 10, and the second in St. Louis, February 4 and 5, at which last the record shows that about 300 attended.

There were no Regional Meetings in 1945 or 1946, and then at the Annual Meeting in Atlantic City in 1946, the Constitution was amended by inserting as Article V a new article entitled "Regional Meetings". It contained four sections. Section 1 provides:

> Regional Meetings of the Association may be held each year at such times and places, and serving such areas, as the Board of Governors shall designate. All arrangements for these meetings shall be under the supervision and control of the Board of Governors.

The other sections of the new article dealt with mechanics and gave the meetings the right to take action having effect as the expression of the members

present and as a recommendation to the House.

We commented editorially in the March, 1947, issue of the JOURNAL:

> Our Association has launched a series of Regional Meetings to constitute "local Assemblies" of the Association, leading up to the Annual Meeting of each year. . . .
>
> An amendment of the Constitution makes these Regional Meetings an integral part of the Association's structure. . . .
>
> How to make the Regional Meetings of maximum interest, appeal and usefulness, to the rank and file of Association members, is a matter on which experimentation and experience will have to develop and point the way.

The first two meetings under the amended Constitution came in 1947—in Omaha, January 24 and 25, where 309 attended, and in Jacksonville, Florida, on May 2 and 3.

Almost four years passed before we convened again in Atlanta, March 7 to 10, 1951, where there were 700 in attendance. At Dallas, April 16-21, 1951, at a Regional Meeting including among its features the dedication of the Southwestern Legal Center, 1,255 participated. "Experimentation and experience" were indeed pointing the way.

Since Dallas, five more Regional Meetings have been convened, each a great success:

1952 Louisville, April 10-12
Yellowstone, June 17-20
1953 Omaha, April 30-May 2
Richmond, Virginia, May 4-6
1954 Atlanta, March 3-5, immediately preceding the Midyear Meeting of the House of Delegates in the same city.

One more is already scheduled for 1954, to be held in Portland, Oregon, this month.

In Atlanta last March, all attendance records were eclipsed, for no less than 1,600 members of the Association were registered.

This brief review contains only the bare bones of the exhilarating story of the growth and development of Regional Meetings. They have amply justified the confidence and the vision of those who, with patience and determination and no little genius, have brought this movement to fruition in such brilliant fashion. These meetings seem certain to be a permanent part of our procedure henceforth.

■ *Removing an Incentive*

An article in this issue describes the Langer Bills which would amend the Bankruptcy Act to bring the United States Attorneys into many bankruptcy proceedings and to provide for standing attorneys for trustees and receivers in bankruptcy and for standing receivers and trustees as well. Harry S. Gleick points out the sacrifice involved in doing away with the personal relationships which now actuate the private attorneys and the court-appointed officers who now serve in individual cases. Their likelihood of re-employment depends upon the excellence of the service that they render in each case. The article demands of all of us the most careful thought as to whether that sacrifice is justified by any improvement of conditions that may be brought about by the enactment of the Bills.

American Bar Center Nears Completion

■ With little more than three months remaining before the 1954 Annual Meeting of the Association in Chicago, an all-out "home stretch" drive is under way to complete the $1,500,000 building fund for the American Bar Center.

The fund stands at 84 per cent, or $1,260,000 in gifts and pledges, as this is written.

The goal is to top the 100 per cent mark before the Bar Center is dedicated August 19 as the gala highlight of this year's Annual Meeting August 16-20. Chief Justice Earl Warren is to be the principal speaker at the dedication. Robert G. Storey, immediate past President of the Association, also will speak.

Construction of the Bar Center itself is about two thirds complete and is moving ahead approximately on schedule. The three-story, two section limestone edifice will be finished in July, barring unexpected delays, in ample time for lawyers attending the Annual Meeting to inspect it in its finished state. The planned "open house" will be a triumphal feature of the dedication program.

While the fund-raising is in its final phase, a great amount of campaign work remains to be done. In some localities, local campaigns have not been carried through to the point where all lawyers who would wish to join the roll of "builders" have been solicited for gifts or pledges. The American Bar Foundation's national finance committee, under the chairmanship of George Maurice Morris, of Washington, D. C., is now placing primary emphasis on these two objectives:

1. Completion of the local campaigns, so that every member of the legal profession will have

an opportunity to take part in this great co-operative effort of the profession.

2. Negotiation of special memorial gifts.

The importance of completing the local campaigns where contributions are below average is reflected by this significant fact: to date, about one out of every five members of the American Bar Association has made a contribution to the Center. These gifts and pledges average $57 each.

At the same time, lawyers unaffiliated with the Association have made average gifts of $25 each. These nonmember donors constitute about 20 per cent of the total contributors among the first 7,000 gifts analyzed. Gifts and pledges, from all sources, total in number over 13,300.

Other interesting facts about pledges to date are these: pledges of members of the House of Delegates average $644 each (with virtually every member represented); of 646 members of the "official family" of the American Bar Association, as taken from the index of the Association's directory, approximately 62 per cent have contributed an average of $310 each.

Twelve states had reached or exceeded their campaign quotas by April 1, and several others were near the 100 per cent mark. The states which were over 100 per cent of their quotas were:

New York, Cloyd Laporte and Orison S. Marden, directors respectively of New York State and New York City; Montana, William J. Jameson, director; Indiana, Telford B. Orbison, director; Wyoming, H. Glenn Kinsley, director; Delaware, James B. Morford and William Poole, directors; Idaho, A. L. Merrill, director; North Dakota, Herbert G. Nilles, director; Georgia, E. Smythe Gambrell, director; Illinois, John E. Cassidy and William H. King, Jr., downstate and Chicago directors respectively; Michigan, Fred Roland Allaben, state director, and George E. Brand, William Cudlip and Henry Woolfenden, codirectors for Detroit; Ohio, Ralph E. Marburger, director; and New Hampshire, Robert W. Upton, director.

Virtually completed were campaigns in two other states, which were running ahead of the national average:

Oklahoma, William S. Hamilton, director, and Missouri, Richmond C. Coburn, director.

Every lawyer who makes a gift or pledge to the Bar Center fund will have his name permanently inscribed on an attractive "Roll of Builders" which will be prominently displayed in the main reception hall of the administration building.

It is not too late for any lawyer to have his name added to this "Roll of Builders." Gifts to the American Bar Foundation are tax-exempt. They may be pledged for payment over a three-year period if desired.

The builders' roll will consist of easy-to-read glass panels set in handsome bronze frames. The panels will be hinged on a vertical standard, so that each panel may be read and turned like the pages of a book. Donors' names will appear in gold letters. The present plan is to have the

View of the front of the new American Bar Center showing progress as of March 27.

Another view of the American Bar Center, showing the Bar Research Building on the right. This picture was taken March 18.

names of all individual contributors, law firms, corporations and other donors listed on the permanent roll.

Two other plans to encourage substantial memorial gifts are being carried out simultaneously by the Foundation. One involves rooms to memorialize deceased leaders of the legal profession. Several such memorial subscriptions already have been received, but a number of other suitable rooms in the Center still are available for memorial gifts.

Amounts required for these perpetual memorials are computed according to the estimates of cost of furnishing and equipping the rooms. They range from $5,000 to $33,500. Among the rooms still available as memorials are the beautiful members' lounge, office of the President, office of the executive director, office of the business manager, the public relations department, office of the co-ordinator of bar activities, the JOURNAL office, the research director's office, reading rooms of the Research Center, microfilm room and individual research offices.

Another type of memorial for distinguished deceased members of the Bar is illustrated elsewhere in this issue (see page 429). On the south wall of the lobby of the administration building, under the inscription, "In Commemoration of the Following Distinguished Lawyers, Gifts Have Been Made to the American Bar Center" there will appear, incised in marble, the names, states and the dates of birth and death of the former bar members in whose memory the families or friends have made gifts in a minimum amount of $1,000.

Completion of the Bar Center and its financing will constitute the greatest co-operative achievement in the history of the Bar in the United States. It will be a milestone of progress both in the physical growth of the organized Bar and in the growing recognition by the members of the legal profession of their responsibilities to the public and to their fellow lawyers.

Functioning of the Bar Center promises substantial benefits to every practicing lawyer. This is true in the case of the tangible assistance he will gain in his daily practice by having access to the materials of the Bar Center, and also in the increased national prestige which the Center will bring to the profession.

At the same time the project imposes an increased financial responsibility upon the Association. With the completion of the Center, and the launching of its facilities, the Association will be subjected to substantially larger expenses. The only logical and feasible solution to this problem lies in a greatly enlarged membership. Only through increased membership can the Association expect to augment its revenues so as to carry on the broadened program of activities demanded of it.

An accelerated membership campaign is now under way, and the Association is reliant upon the co-operation of its present members—through continued support and encouragement of other qualified lawyers to join—for the success of this collateral effort.

Lawyers and the Fifth Amendment:

A Dissent

by Ralph S. Brown, Jr. • Professor of Law at the Yale Law School

■ The *Journal* rarely publishes articles which take a position contrary to an official position of the Association; there is hardly enough room in our columns for discussion of the issues on which the Association has not yet made up its mind. It cannot be gainsaid that Professor Brown's attitude toward the problem of the lawyer who invokes the privilege against self-incrimination differs from that of the majority of the House of Delegates which approved the report of the Special Committee on Communist Tactics, Strategy and Objectives. We believe that the action of the House was based on a conviction that the lawyer, by choosing his high calling, renounced every shield except the truth itself. Nevertheless we also believe that the report went no further than to let it be known, as the *Journal* editorial said, that there is "grave doubt" that a privilege-claiming lawyer ought to be permitted to continue to practice. In most of the states the doubt has not been resolved. Professor Brown's article makes as good a case as we can imagine for resolving it in favor of the lawyer who invokes the shield of the Fifth Amendment.

■ The editorial on "Lawyers and the Fifth Amendment" in the December, 1953, number of the JOURNAL brings forcibly to attention what I believe to be an indefensible position reached by the House of Delegates during 1953. Let us review briefly the steps leading to the editorial's sweeping assertions that a lawyer "must answer" "proper questions propounded by duly constituted authority", and that if he "takes advantage of the protection offered by the Fifth Amendment" he has "forfeited the right to enjoy the privilege of remaining on the rolls". In such terms, the editorial proclaimed, "The House of Delegates has spoken."

For its first step the Association, as is well known, adopted the position that any member of the Communist Party should be excluded from the practice of law.[1] This position rests on familiar evidence of the revolutionary character of the Party. An advocate of revolution, it is said, cannot faithfully carry out the lawyer's obligation to uphold the Constitution. Further support for the exclusion of Party members is found in generalizations about the dishonesty, wickedness, deceitfulness, etc., of Communism and hence of Communists. This general rule of ineligibility, which has been extensively applied in other professions and fields of employment, requires an inference that *all* Communists share these deplorable traits. Maybe they do. However, the difficulty of proving a universal, and the proposition that guilt is personal, should require some showing that the individual member of the Communist Party knows and shares its illegal purposes and immoral characteristics. For example, the public might be led to believe that all members of the American Bar Association support the Bricker Amendment. But it would surely be considered unfair if a member of our Association were to be dismissed from a policy-making position in the Department of State for his presumed support of the Amendment without an opportunity to show that he in fact opposed it, and that he had stayed in the Association only because he shared its enthusiasm for legal aid.

One need not labor this painful analogy. The day is approaching, if it is not already here, when Communist Party membership will in itself be criminal and accordingly unprofessional.[2] So we may go on by the first step, having noted that it

1. Proceedings of the House of Delegates, 1950, 36 A.B.A.J. 948, 972 (1950); see also 37 A.B.A.J. 128 (1951).

2. Compare Section 4(f) of the Internal Security Act of 1950 (membership in a Communist organization not per se a violation of "this section or of any other criminal statute") with the Massachusetts sedition statute of 1951 which specifically declares the Communist Party to be a subversive organization, membership in which is criminally punishable. Mass. Ann. Laws, c. 264, §§ 16A, 19 (1953 Supp.). For penetrating analysis of other recent legislation, see Warren P. Hill, "A Critique of Recent Ohio Anti-Subversive Legislation", 14 *Ohio State Law Jour.* 439 (1953).

Some readers will deny the validity of any comparison between the Communist Party, a tightly disciplined organization, and the American Bar Association, a somewhat chaotic one. But the illustration just given serves to emphasize that disbarment challenges the fitness of a person, not the tenets of an organization.

has hitherto teetered on a false syllogism: Most Communists are wicked; *X* is a Communist; therefore *X* is wicked.

The second step was taken at the February, 1953, meeting of the House, and was duly reported in the JOURNAL.[3] A resolution was adopted, reciting that some attorneys had refused to answer lawful inquiries about Communist Party membership and activities, because their testimony would tend to incriminate them. Let us pass the question whether all the inquiries were lawful. The heart of the resolution, which was consistent with the Association's position that Communists may not practice law, was a recommendation that appropriate disciplinary bodies make inquiries into the activities and conduct of lawyers who had invoked the privilege. Note that the February resolution went no further. It only assumed that some, many, or most of those who invoked the privilege were in fact Communists or had committed some other offense. In that case, a review of their professional behavior and of their law-abiding would be appropriate. The resolution did not pursue the fallacy already mentioned, which may be restated as follows: Most people who invoke the Fifth Amendment are guilty of something. *X* invoked the Fifth Amendment. *X* is guilty of something.

However, it took only a few months for the House, in adopting a Report of the Special Committee on Communist Tactics, Strategy and Objectives, to turn law and logic upside down again. This Report, the third step, included an astonishing passage. Here it is; I do not think it has been previously printed in the JOURNAL:

> Perhaps better than laymen, an attorney can weigh his past acts and more accurately determine whether or not his testimony concerning them might be incriminatory. Therefore, when a citizen, who is an attorney, refuses to testify on the ground that his testimony might tend to incriminate him of undisclosed crimes, then upon his own sworn statement which we must assume is honestly and sincerely asserted, his personal constitutional right must be honored, but in asserting this right he himself has thereby disclosed disqualification for the practice of law. The license to practice law is not an absolute right but is a privilege revocable for cause.

The palpable error in this statement lies in its assumption that a person who honestly invokes the privilege must have committed an "undisclosed crime". The scope of the privilege is not so limited. It protects a witness from compulsory disclosure, not only of criminality, but of admissions that may tend to incriminate him—that is, expose him to the risk of prosecution. As the Supreme Court recently said:

> The privilege afforded not only extends to answers that would in themselves support a conviction under a federal criminal statute but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime.[4]

This beneficent reach of the privilege is summed up in the familiar reminder that it protects the innocent as well as the guilty.[5]

I do not mean to fall into the opposite error from the Committee's, and suggest that only the innocent invoke the privilege. Nothing could be less realistic. Though we have no present way of knowing the ultimate facts, it is possible that most of those who claim the privilege as to Communist membership are in fact Communists. But it should be remembered that, especially in the past year, there have been many laymen if not lawyers who have grasped at the privilege because they mistakenly thought it was available as a substitute for other objections to questioning whose legal status was uncertain—for example, the First Amendment ground. Any observer is entitled to study the hearings and to make his own assessment of the probable incidence of Communism among the scores of witnesses who have invoked the privilege. But it is impermissible for a body of lawyers, who should know the history and purposes of the privilege, to assert that any one witness who claims it *ipso facto* concedes the point in issue.

It is possible, but hard to believe, that the Committee and the House have been deafened by the trumpeting of some legislative investigators who declare that every claim of privilege entitles them to chalk up another Communist. Perhaps they have been seduced by a plausible query often put to witnesses who have claimed the privilege, when asked if they were members of the Communist Party. "If your truthful answer would be 'No'," the investigators ask, "How could that possibly incriminate you?" How indeed?

There are answers to this seductive question, but they are answers which the witness himself can scarcely volunteer. Consider the difficulties confronting the witness who, though never himself a Communist, has had, in the lawful pursuit of political or social goals, Communist associations. We have not yet reached the point, I take it, where such associations are an occasion for disbarment. But, for all the witness now knows or ever knew, his Communist friends may have been spies. By answering questions about them, he may be providing links in the chain for a conspiracy indictment. He is legally entitled to claim the privilege. He is also, according to the latest Association position, disqualifying himself for the practice of law, without even reaching the critical questions, "Are you a Communist?" and, "How could your denial incriminate you?"

Here the witness—layman or lawyer—is confronted with the uncertain

3. April, 1953, page 344.

4. *Hoffman v. U.S.*, 341 U.S. 479, 486 (1951).

5. *Twining v. New Jersey*, 211 U.S. 78, 91 (1908); 8 Wigmore, *Evidence* 308-9 (3d ed.). The privilege at bottom seems to be aimed at decent law enforcement, wherever its protection may fall. The simplest way to "solve" crimes has always been to extort a confession from a suspect. In the words of Sir James Stephens' Indian officer (quoted by Wigmore, *id.* at 312): "It is far pleasanter to sit comfortably in the shade rubbing red pepper into a poor devil's eyes than to go about in the sun hunting up evidence". This approach is as old as history, and as new as the trial of Cardinal Mindszenty. Its rejection is one of the marks of distinction between us and totalitarians. Every lawyer should read the judicious appraisal of the privilege by Dean Erwin Griswold of Harvard, in an address to the Massachusetts Bar Association on February 5, 1954, reprinted in *The Harvard Law School Record* of February 11, 1954, and elsewhere.

hazards of the doctrine of waiver. To be sure, the conventional application of waiver comes when the witness has already admitted—not denied—the essential ingredient of an offense.[6] However, investigators have not been content to let it rest there. The harried witness who denies that he has committed espionage may be ordered by an exceedingly belligerent Senator to answer questions about Communist associations on the ground that he had "waived" his privilege.[7] This may be good badgering but bad law; at present, who knows?

Finally, let us push the witness a little nearer the edge of the cliff, and assume that he has been identified as a Communist in the testimony of another. If the witness flatly contradicts a prized informer, it is likely that the witness, and not the informer, will be prosecuted for perjury. Is the privilege available in this situation? The most that can be said is that the legal situation is uncertain.[8]

My point here has been, not to penetrate the intricacies of conspiracy, waiver and perjury, but simply to indicate as briefly as possible why witnesses who could truthfully answer "No" to the $64 question may be advised by conscientious counsel – anti-Communist too – that they should invoke the privilege. This despite the drastic collateral consequences, of which the Special Committee's position gives such vivid evidence.

The current position of the Special Committee, endorsed by the House of Delegates, appears to be bottomed, as we have seen, on a misunderstanding of the logical significance of a claim of privilege by a lawyer charged with Communism. The JOURNAL, without mentioning Communism, attempts to bolster the Committee's position with another argument, one that gains relevance from the current situation, but has broader implications. "He" [the offending lawyer], says the JOURNAL, "must answer and thus disabuse the public of any lingering doubt as to his record and his standards and ideals or he must take the consequences."

By refusing to answer:

> . . . he cannot escape suspicion of wrong-doing and if that suspicion attaches to his reputation, brought on by his own conduct and irrespective of the facts, he can no longer ask others to believe that he will continue to discharge with honor the obligations that attach to his license.[9]

The editorial, it will be observed, avoids the logical error we have been criticising up till now, for it does not assume that the mute witness must be guilty. Instead it adopts what can be described only as a position of excessive nobility. Lawyers should be above suspicion. So they should. And if a lawyer falls under suspicion, he should be disbarred. Wait a minute! Is this not a dangerous canon, that want of public confidence should be the measure of professional qualification? There have been times when the rigorous application of such a standard would have decimated the banking sector of the Bar (1933) or the insurance sector (1906), just as it is now proposed to decimate the left-wing sector. I had supposed that the consequence of public disfavor was loss of clients, not professional censure. I had further supposed that the function of disciplinary measures was to protect the public from those guilty of professional misconduct, not to bend a servile ear to every anti-Communist blast.

What does the public know about the Fifth Amendment, anyway? It is told in every headline, on the authority of prominent legislators, that silence means guilt. Corroboration is then adduced from the testimony of witnesses, some of them private citizens groping in their memories, some of them common informers, none of them subject to the probe of cross-examination. The Bar should be advising the public about the significance of the privilege, and about the unreliability of informers' testimony. Instead, this is what spokesmen for the legal profession are in effect saying: "If a lawyer is named as a Communist in 'sworn testimony' (whose, it apparently matters not), and refuses (invoking a constitutional privilege) to testify that he is not, off with his head! Even if he in fact isn't a Communist, we can't have people thinking that some lawyers are."

I submit that all the eminent law-

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6. *Rogers* v. *U.S.*, 340 U.S. 367 (1951), noted 61 *Yale L. J.* 105 (1952).

7. Senator McCarthy's approach was succinctly stated in a speech reported in the *New York Herald-Tribune*, January 31, 1954, §1, page 8: "I take the position that once a man comes in and says he's not an espionage agent he waives the Fifth Amendment". It is possible that the Senator has confused the status of a witness before an investigating committee with that of the defendant in a criminal trial. The latter is of course free not to take the stand; but if he does, he waives the privilege against self-incrimination to some extent; see 8 Wigmore, *Evidence* §2276(2) (3d ed.).

8. Paul Shipman Andrews in a letter to the *New York Herald-Tribune*, October 26, 1953, describes an episode in which a claim of privilege apparently based on fear of perjury prosecution was not challenged by the Committee on Un-American Activities.

9. December, 1953, page 1084.

yers concerned in the regrettable pronouncements we have here reviewed should have looked up the law first. They would have found that the leading case on disciplining lawyers who rely on the Fifth Amendment was unanimously decided by a great court—the New York Court of Appeals—as recently as 1940. The case did not, it is true, involve suspected Communists. The victim was a suspected ambulance-chaser. New York ambulance-chasers at that time were almost as much beset as Communists are now. This may have been unfair, because the ambulance-chasers had neither a revolutionary ideology nor an H-bomb behind them. Anyhow, a suspected lawyer refused to waive statutory immunity from prosecution for any disclosures he might make in a judicial investigation. His position was that, though he was innocent of wrongdoing, the questions he was expected to answer were incriminating in the sense that they might expose him to a criminal prosecution. Disciplinary proceedings were commenced. They ended when the Court of Appeals held:

> The privilege against self-incrimination is a constitutional guaranty of a fundamental personal right. Long regarded as a safeguard of civil liberty it was firmly imbedded in the law of England and by the Fifth Amendment to the Federal Constitution became a basic principle of American Constitutional law. "It is a barrier interposed between the individual and the power of the government, a barrier interposed by the sovereign people of the State; and neither legislators nor judges are free to overleap it." (*Matter of Doyle*, 257 N.Y. 244, 250). Applying this basic principle to our present problem we have no doubt that when the appellant, as a witness upon the inquiry at the Special Term, declined to sign a waiver of immunity and thus refused to relinquish in advance a privilege which the Constitution guarantees to him, he was within his legal right. As was said by Presiding Justice Lazansky in *Matter of Ellis* (258 App. Div. 558, 572), expressing the minority view at the Appellate Division: "The constitutional privilege is a fundamental right and a measure of duty; its exercise cannot be a breach of duty to the court."
>
> It follows that, upon the facts disclosed by the record, the present disciplinary proceeding instituted against the appellant, wherein the single offense charged is his refusal to yield a constitutional privilege, is unwarrantable.[10]

It is unlikely that the exercise of the privilege stands on any different footing from a refusal to yield it. The law as laid down in the *Grae* case is a salutary curb on our occasional impatience with the privilege, an impatience especially manifest in recent years when, as many think, not only crooks but traitors are sheltered by it. In the words of the Special Committee, "We should and must protect fundamental rights—even of Communists". We do not protect fundamental rights by making their exercise ground for disbarment.

10. *Matter of Grae*, 282 N.Y. 428, 434, 26 N.E. 2d 963, 966 (1940). Accord, *In re Holland*, 377 Ill. 346, 36 N.E. 2d 543 (1941). These decisions do not mean that a claim of privilege must be ignored. They do remind us that disbarment is a judicial proceeding, preceded by a hearing, and requiring the production of competent evidence of moral turpitude or professional misconduct. 7 C.J.S. 780-788. A grievance committee may be spurred by a lawyer's invocation of the privilege with respect to questions about criminal or unethical conduct to dig up some evidence. It may then, having presented an affirmative case before the appropriate tribunal, question the respondent. If he declines to answer, then reasonable inferences may be drawn from his refusal. *Fish* v. *State Bar*, 214 Cal. 215, 4 P. 2d 937 (1931). But can a case be built on the respondent's silence, with nothing more? I should say that it cannot.

A denial of admission to the Bar, as distinguished from disbarment, is on a different footing, because as the law stands the applicant has the burden of satisfying the character committee or its equivalent of his fitness to be enrolled. If the applicant refuses to answer relevant questions, he probably cannot demand that he be admitted. See Brown and Fassett, "Loyalty Tests for Admission to the Bar", 20 *U. of Chi. L. Rev.* 480 (1953); but *cf.* Countryman, "Loyalty Tests for Lawyers", 13 *Lawyers Guild Rev.* 149 (1953).

The Taft-Hartley Act

(Continued from page 399)

to the lockout to force the abandonment of a bargaining demand by the union, although, of course, the union may use a strike to secure its demand.

If it is right for the union to strike whenever it is advantageous to seek an increase, justified or not, is it not equally just for the employer, if he opposes the union and some of its aims, which he considers damaging to business or to be socialistic, to apply economic pressure against the union or seek to get rid of it?

This philosophy which favors unions as against employers bears a suspicious socialistic taint, and leads to one law for unions and another for employers. We can readily concede that war between employers and unions is not a healthy situation, but when there are group strivings, misunderstandings, misrepresentations and misinformation, there are bound to be conflicts. If we cannot get rid of these, we can at least make sure that the law bears down equally on each.

It is hoped that this situation will be clarified for the President, lest he be led into advocating a continuation of the biassed and unfair situation existing under the Wagner Act. When we consider the obligation that our democratic economy owes to the private employer who provides employment for millions of our fellow citizens, we should not be too quick to doubt his judgment as to what is good for his business, since it is by his effort and ambition that we have it. He makes mistakes, but so does the government, but we well know that if private enterprise is crushed, there is little choice but Communism. Before we rush too quickly to the aid of the unions in their struggle for power, let us examine for a moment what their aim is and how it comports with democratic rights.

Our Friendless Constitution:

Do We Need a Board of Censors?

by **Henry W. Coil** • of the California Bar (Riverside)

■ It must impress any impartial observer as an oddity that, in a constitutional government, legislative acts violative of the fundamental law may be adopted and executive excesses may be practiced, both to continue indefinitely so far as any corrective governmental action is concerned; that the privilege or duty of preserving the principles of the Constitution is, in the majority of instances, confined to private parties who are sufficiently injured and interested to meet jurisdictional tests; and that, in the absence of such private initiative, unconstitutional courses may be followed without limit in number or duration.

■ The recent celebrated case,[1] involving seizure of the steel mills pursuant to Executive Order, emphasized a peculiarity of our Government which may not have been generally observed, *viz.*, that, while all governmental activities are presumably to be conducted in accordance with the overriding plan and provisions of the Federal Constitution, there is no officer or body whose primary duty it is to see that no violation of the Constitution occurs or, if it does occur, is not permitted to continue.

Neither the Supreme Court nor any inferior court has power to intervene of its own motion or otherwise than at the instance of some complainant to restrain even that which appears to be an obvious disregard for constitutional mandate or policy. In the steel mill case, there seems to have been no one in the Government competent to invoke the jurisdiction of any court, so that neither Judge Pine nor the Supreme Court would have taken cognizance of the act which seriously infringed constitutional principles, unless some private person or corporation were injured and complained. If no owner of a steel mill had sought legal relief (some steel companies did not), there would have been no judicial determination of the constitutionality of the President's action, and another precedent would have been created, to be followed by others until a body of precedents should have been built up sufficient to work an alteration in the Constitution. Indeed, some such occurrences, more or less in point, which had arisen in both the distant and the recent past were relied upon in argument of the case.

It may be suggested that it is the duty of all federal officers to uphold and enforce the Constitution, as shown by the oath taken by the President,[2] or by other executive officers,[3] which requires those officers to restrain infringements of the Constitution by themselves as well as by others. But this is hardly so, for several reasons.

In the first place, the President and other executive officers are not privileged conclusively to pass upon the constitutionality of their own acts, that being the function of the courts, and, from the courts, no advance or advisory opinions are available. Indeed, overly conscientious executives (with whom, however, we have not been surfeited in recent years) might cause public injury by failing, out of excessive caution, to do that which they are empowered and ought to do.

In the second place, it is not clear just what act would constitute a violation of the President's oath to "preserve, protect and defend the Constitution". In ordering seizure of the steel mills, the then President claimed to be performing that very duty. Neither the Attorney General, the Solicitor General nor the defendant Secretary of Commerce could reasonably be charged with aiding domestic or foreign enemies or with failing to bear true faith and allegiance to the United States.

The Attorney General is often thought of as our top national counsellor at law or even as a quasi judicial officer, who advises the "Government" on all legal matters, with some degree of authority, his opinions being published in numbered volumes and given considerable weight. But the term *government* is indefinite, and, whether we realize it or not, when we refer to

1. *Youngstown S. & T. Co.*, v. *Sawyer*, 343 U. S. 579, 72 S. Ct. 863.

2. Constitution, Article II, Section 1: I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States.

3. 5 U.S.C. 16; I, A. B., do solemnly swear or affirm that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God.

the Government, we usually mean the executive department, just as in Great Britain the reference is to the Prime Minister and his Cabinet. The Attorney General does not act as legal counsel for either the legislative or the judicial department, but only for the executive department. The Department of Justice is inaccurately named, for it is an executive agency,[4] and the Attorney General, who heads it, is the appointee of the President, a member of his Cabinet, usually of the same political party, and often his personal friend. Neither the Attorney General nor the Deputy Attorney General is required by statute to be learned in the law, though the Solicitor General and the six Assistant Attorneys General are.[5]

The office of Solicitor General is a curious one and not easily accounted for. The statute makes the Solicitor General subordinate to the Attorney General, as are also the Deputy Attorney General and the Assistant Attorneys General, but assigns to him no particular duties other than "to assist the Attorney General in the performance of his duties". Since the number of Deputies and Assistants to the Attorney General could be increased without limit as the amount of work might increase, the reason for introducing the title of Solicitor is not apparent. By official routine, however, the Solicitor General has come to be the one who represents the United States in matters coming before the Supreme Court, both civil and criminal,[6] although he may be accompanied on the briefs by other members of the Department of Justice or counsel for the executive bureaus or independent establishments. The Solicitor General may, and occasionally does, appear for the United States in the lower courts (as he did in the steel mill case), and his approval is required before an appeal or application for certiorari is filed on behalf of the United States from lower to higher courts. He also becomes Acting Attorney General when that officer is out of the District of Columbia.

Attorney General Is an Advocate, Not a Judicial Officer

It seems to be the primary duty of the Department of Justice, including the Attorney General and the Solicitor General, to support the President and other executive officers, departments and bureaus against all comers, including Congress, the states and the people, and this, too, even where it is alleged, with every appearance of truth, that the challenged conduct is violative of the Constitution. In short, the members of the Department of Justice are not judicial officers but advocates, and, like most advocates, they try to effectuate the purposes of their principals. In so doing, they can hardly be charged with failure to bear true faith and allegiance to the Constitution; nor can they be criticized even for supporting "obviously" unconstitutional conduct, for what is obvious to one person may be far from obvious to another, and the class of things which are obviously unconstitutional has been reduced to a minimum during the past twenty years.

Our purpose, of course, should be and is, not to disparage any member of the Department of Justice, but to ascertain if some part of the necessary constitutional machinery is missing or improperly functioning. We have to remember that few decisions, legislative, executive or judicial, are reached with unanimity. In the case involving seizure of the steel mills, the Chief Justice and two Associate Justices dissented and few of the six who concurred in the judgment were satisfied to stand upon the reasons assigned by others. Can an act which is supported by one third of the Court be called manifestly or outrageously unconstitutional? Can any of the executive department be expected to possess sounder judgment as to what is constitutional or unconstitutional than a Justice of the Supreme Court?

Thus far, we have considered only excesses of the executive department, but there may be congressional breaches of the Constitution, and it is only fair to say that the executive department has to answer not alone for its own constitutional infractions but often for those of Congress. This is so because a statute may operate by authorizing and directing an officer or bureau to do things which affect someone's constitutional rights, in which event, litigation is instituted, not against Congress or the United States, but against the executive agency in charge. Even suits which attack the constitutionality of appropriations and, hence, of the taxing power to supply the funds for that purpose, are usually brought against some executive officer who is spending the money.

Only Injured Party May Challenge Constitutionality

In all such cases, the general rule holds that nothing can be done about unconstitutional legislation, taxation or appropriations, except by some private person who is directly injured. But, in contradistinction to the right of a taxpayer in a municipality to restrain illegal taxation or expenditures, a federal taxpayer has no similar right, no matter how great his tax contribution may be.[7] That being so, there is, in practice, no constitutional limitation on the purposes for which Congress may tax or spend so long as it does not spend in a manner which proximately causes private injury.

Though the General Accounting Office,[8] headed by the Comptroller General, has been set up to prevent the expenditure of public funds otherwise than as authorized by some act of Congress, this check probably does not extend behind the legislation to test its constitutionality.

There are some matters of grave

4. 5 U.S.C. 291.
5. 5 U.S.C. 291, 293, 294, 295.
6. One who has contested a matter in the lower courts with the United States or any of its departments or agencies should remember that, so soon as an appeal is taken to, or a writ of certiorari is granted by the Supreme Court, the conduct of the case, immediately and without formal notice or substitution of counsel, shifts to the Solicitor General, and all notices, briefs, and correspondence in the case should be addressed accordingly.
7. *Frothingham* v. *Mellon*, 262 U. S. 447; *Duke Power Co.* v. *Greenwood County*, 302 U. S. 675; *Alabama Power Co.* v. *Ickes*, 302 U. S. 464.
8. 31 U.S.C. 41 *et seq.*

national import, arising from time to time, which do not involve any violation of the Constitution, but with respect to which the Attorney General is likely to support the President as against what to many would appear to be the just and proper course. Examples of these may be found in former Attorney General Cummings' advocacy of President Roosevelt's proposal to "pack" the Supreme Court, a project so extreme and distasteful that it alienated a number of influential Senators and Representatives who had been among that President's staunchest supporters; and, more recently, the reluctance of one or more Attorneys General to differ with what was generally regarded as President Truman's tolerance of both Communism and rascality in portions of the executive department. Since such matters involve no constitutional problems, but only those which are moral or political, no such technical excuse is allowable as that which applies to advocacy or the latitude accorded counsel in the presentation of a legal argument or theory.[9]

It should be said on behalf of any Attorney General, however, that, in writing formal opinions for the advice of the President and others of the executive department, he, like the ordinary practicing attorney advising a client, usually writes *ex parte*, and he does not have the advantage which a court possesses of hearing an opposing advocate point out the weaknesses in a proposed opinion and the strength of the contrary view.[10]

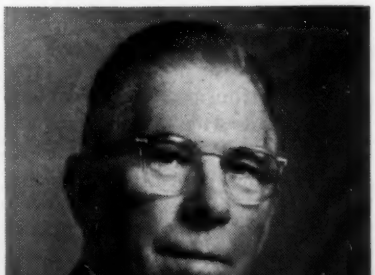
So, officially, the Constitution has no friend whose duty it is to fly to its defense when it is violated or threatened. That function is performed, if at all, by private enterprise with the profit motive, so to speak, that is, by some individual or company primarily for his or its own benefit, rather than to preserve the integrity of the Constitution as an independent objective.

The failure to provide some agency in the nation which would, in the absence of private actionable injury, move to set aside unconstitutional acts of the legislative and executive departments has permitted important changes to be made that are unauthorized by the Constitution. One of the outstanding examples is the Department of Agriculture. The Constitution gives the Federal Government no powers over agriculture, and that this was clearly understood and intended is shown by Jefferson's remark that, "Were we directed from Washington when to sow and when to reap, we should soon want for bread." But now Congress does tell us when to sow and when to reap or, having sowed, whether or not we may reap.[11]

The Department of Agriculture, which has become one of the largest of the executive departments and through which Congress may exercise life and death control over agriculture or types of agriculture by simply including them, or excluding them from subsidy, parity, or price stabilization programs, began its existence in 1839 with a trivial appropriation of $1000 for the purpose of collecting some statistics on farming, to which, of course, no one could have objected, since no private interest was directly injured.

Strange as it may seem, the general problem under discussion was appreciated in Revolutionary times by two states which authorized the election of censors to guard the state constitutions from infringement, but the idea did not spread, and those states afterwards abandoned the plan. This device appears to have been adopted at the suggestion of Montesquieu, who praised the employment of censors under the Roman Republic.[12]

The Constitution of Pennsylvania, adopted in 1776, provided for two censors who were to be elected in each city or county for terms of seven years. They were to perform functions in the nature of those of a modern grand jury so far as concerns the conduct of public officers, but not as to criminal offenses in general, that is, they were to oversee the conduct of public officers and make inquiry as to whether the Constitution had been violated. This pro-



Henry W. Coil has been General Counsel for the California Electric Power Company and its associated and predecessor companies since 1926. A graduate of the University of Colorado and the University of Denver Law School he was admitted to the Colorado Bar in 1914 and to the California Bar in 1919.

9. It is too early to predict the role of the Attorney General in the Eisenhower Administration, but newspaper accounts up to the present indicate the likelihood that he will be, in part, a political emissary and patronage dispenser, possibly superseding the Postmaster General in that time-honored capacity.

10. In *McGrath* v. *Kristensen*, 340 U. S. 162, Mr. Justice Jackson said: "I concur in the judgment and opinion of the Court. But since it is contrary to an opinion which, as Attorney General, I rendered in 1940, I owe some word of explanation. 39 Op. Atty. Gen. 504. I am entitled to say of that opinion what any discriminating reader must think of it—that it was foggy as the statute the Attorney General was asked to interpret. It left the difficult borderline question posed by the Secretary of War unanswered, covering its lack of precision with generalities which, however, gave off overtones of assurance that the act applied to nearly every alien from a neutral country caught in the United States under almost any circumstances which required him to stay overnight.

"The opinion did not at all consider aspects of our diplomatic history which I now think, and should think I would then have thought, ought to be considered in applying any conscription act to aliens. . . ."

11. Some activities of the Department of Agriculture are unquestionably proper federal functions, for example, the Forest Service administers property of the United States under Article IV, Section 3 of the Constitution, and the animal and plant inspection, quarantine, pest and parasite control are supported by the commerce clause.

12. *Spirit of Laws* (Nugent), 69, 119.

vision endured, however, for only fourteen years, being omitted from the Constitution of 1790.

In Vermont, a similar system prevailed for almost a century. That state, in its first Constitution, adopted in 1777, provided that a council of thirteen censors should be chosen by the people every seven years, which should examine the conduct of public officers and determine whether the Constitution had been infringed, whether the legislature had exceeded its powers, whether taxes had been duly levied and collected and the public money properly expended, and whether in general the laws had been duly executed. They also had power to call a constitutional convention at any time they deemed desirable. They last exercised that power in 1870 when the constitutional convention so assembled adopted provisions terminating the Council of Censors.

In our national affairs, congressional investigating committees exercise some powers analogous to those of a board of censors, but they obviously are not expected to be very critical of Congress itself or of executive department officers who belong to the majority party, and they seldom are concerned with alleged violations of the Constitution. Congress has surprisingly little control over unconstitutional activities of federal officers. The power of appointment and removal is solely in the President.[13] Therefore, unless conduct merits the cumbersome process of impeachment, Congress can only abolish the office, repeal the law under which the officer acts, or cut off the appropriation which supports the activity, and it cannot get rid of an objectionable officer by stopping that individual's pay, since that method amounts to a bill of attainder.[14]

There ought to be an officer or official body of some kind in the governmental establishment to symbolize the majesty of the nation, the sovereignty of the people, and the sanctity of the Constitution, to be an adherent and advocate of any department, branch, or officer of the government or of any person or association asserting rights under the Constitution, and to have power to act automatically and without having to be incited by other influences.

Of course, any suggestion that a national board of censors be created would meet immediate and violent opposition, because of the connotation of the word *censor* implying an investigation of morals and a limitation on freedom of speech and press. But possibly a court of advisory opinions might be acceptable for doing that which is now entirely unprovided for, that is, rendering to the legislative and executive departments impartial advisory opinions on constitutional limitations. Such opinions might be rendered either on request or voluntarily and even when it is known that such opinions are unwanted and unwelcome. Notwithstanding that the opinions of such a court would carry no sanction and would be unenforceable by process of any sort, they would be powerful stimulants to public discussion and political education. They would serve as rallying grounds for those who, with such leadership, might co-operate in preserving the Constitution, but who otherwise might not be confident enough of their own opinions or sufficiently bold to do so. Such court or an officer thereof would be authorized to bring and prosecute appropriate actions in other courts having jurisdiction of the subject matter solely upon the ground of violation or threatened violation of the Constitution and without having to show injury to any private person.

In a republic, a democracy or any type of popular government, the ultimate guiding hand and highest power and perpetuating influence is public sentiment, opinion, knowledge, awareness, prudence, information and judgment. Hence, education, discussion, argument, warning, apprehension and informed concern are indispensable.

In the end, there is no power to compel the people to do or refrain from doing anything, but, long before the end is reached, they should be adequately advised as to what they should or should not do. No people will ever intentionally push their nation over the brink of a precipice, but there is no assurance whatever that, being uninformed or ill advised, they will not gradually, one after another, consent to unconstitutional or perilous steps, acts, or procedures which will lead their country into a decline from which there is no escape.

13. Constitution, Article II, Section 2.

14. *United States v. Lovett*, 328 U. S. 303—an unusual case in that the Congress of the United States appeared by counsel as *amicus curiae* by special leave of court.

Books for Lawyers

SUPREME COURT AND SUPREME LAW. *Edited by Edmond Cahn. Bloomington: Indiana University Press. $4.00. Pages 250.*

This thought-provoking book, dedicated to Chief Justice Vanderbilt of New Jersey and edited by Professor Edmond Cahn of New York University, gives to the public at large the benefit of the discussion of judicial review held at New York University on the one hundred and fiftieth anniversary of the decision by the Supreme Court of the great case of *Marbury* v. *Madison,* 1 Cranch 137. The lectures which furnish the basis of the discussion deal with four major subjects: "Review and Federalism", by Professor Paul A. Freund of Harvard; "Review and Basic Liberties", by Professor John P. Frank of Yale; "Review and the Distribution of National Power", by Professor Willard Hurst of Wisconsin; and "Review and Majority Rule", by Charles P. Curtis, of the Boston Bar. The introductory chapter is by Professor Cahn who presents judicial review as a distinctly American contribution to the science of government.

The second and third chapters of the book are reports of panel discussions dealing respectively with "The Conditions and Scope of Constitutional Review" and "The Process of Constitutional Construction". Dean Ralph F. Bischoff of New York University Law School opens the discussion covered by the second chapter with a brief paper on "Status To Challenge Constitutionality"; Professor Frank following him deals with the doctrine relating to "Political Questions"; and Professor Freund with "Review of Facts in Constitutional Cases". In the discussion covered by the third chapter, Professor Hurst deals with "The Role of History" in the process of constitutional construction, Mr. Curtis with "The Role of the Constitutional Text" and Dean Bischoff with "The Role of Official Precedents". The titles clearly indicate the scope of the discussion, which handles very ably most of the important problems of American constitutional law.

Constitutional law is that branch of jurisprudence which deals with the exercise of sovereign power. American constitutional law is concerned with the exercise of sovereign power under our Constitution, which guarantees the fundamental rights of the individual against infringement by governmental power, divides the exercise of sovereign power between state and national governments and, with respect to the national government, makes a tripartite division of power between the legislative, the executive and the judicial branches, with a system of checks and balances so arranged that none of them can long abuse the portion of sovereign power allotted to it or establish a despotism by arrogating the whole thereof to itself. The judiciary is the keystone of the arch of this constitutional system, charged with the responsibility of declaring and upholding the rights of the individual as against the exertion of governmental power, with upholding the rights of the states as against the Federal Government and of the Federal Government against state action, and of preventing the exercise by the departments of government of powers which have not been granted them, as in the steel seizure case. Without this exercise of power by the judiciary, our constitutional system simply would not be workable.

No one ordinarily questions the power of the judiciary to enforce the Constitution as the supreme law of the land where conflict arises in any matter except with respect to the validity of an Act of Congress. Since the foundation of the Government, however, there have been those who have argued that the limitations of the Constitution were intended to be binding upon the consciences of legislators but to have no authority as law to be enforced by the courts. This arises from confusion of thought as to the nature of the Government. With us, sovereign power resides, not in the Government, but in the people. Legislators are but agents to whom is delegated the exercise of governmental power. The Constitution marks the limits of that power; and acts beyond the limits of the power granted must necessarily be void. Otherwise, the creature becomes greater than the creator and sovereign power is vested in the legislature instead of in the people. In *Marbury* v. *Madison,* Chief Justice Marshall announced this doctrine so clearly that it became and remains firmly embedded in our constitutional structure. There seems to me to be no answer to what he had to say on the subject, *viz.:*

> This original and supreme will organizes the government, and assigns to different departments their respective powers. It may either stop here, or establish certain limits not to be transcended by those departments. The government of the United States is of the latter description. The powers of the legislature are defined and limited; and that those limits may not be mistaken or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed, are of equal obligation. It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or that the legislature may alter the constitution by an ordinary act.
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> It is, emphatically, the province and duty of the judicial department, to

say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. So, if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case, conformable to the law, disregarding the constitution; or conformable to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case: this is of the very essence of judicial duty. If then, the courts are to regard the constitution, and the constitution is superior to any ordinary act of the legislature, the constitution, and not such ordinary act, must govern the case to which they both apply.

While the statement in *Marbury* v. *Madison* was of great value in crystallizing and clarifying this doctrine, it embodied nothing new or strange and could in no sense be regarded as judicial usurpation of power. In Federalist 78, Alexander Hamilton announced the same doctrine as a reason for adopting the Constitution. It was set forth in the concurring opinion of Mr. Justice Iredell in *Calder* v. *Bull*, 3 Dallas 286, 398, five years before *Marbury* v. *Madison*, and the supremacy of state constitutions over statutes had been decided by four state courts even prior to the adoption of the Federal Constitution. The cases were *Holmes* v. *Walton* (referred to in *State* v. *Parkhurst*, Halstead 427, 444, and *Taylor* v. *Reading*, 4 Halstead 440), decided in New Jersey in 1779; *Commissioner* v. *Caton*, 4 Call. 1; *Case of the Judges*, 4 Call. 139, decided in Virginia in 1782 and 1788 respectively; *Trevett* v. *Weedon*, decided in Rhode Island in 1786 (2 Arnold, *History of Rhode Island* c. 24, *Cooley's Const. Lim.* (7th ed.) 229, 10 *Records of Rhode Island* (1865) 219); and *Bayard* v. *Singleton*, 1 N. C. 5, 1 Mart. 48, decided in North Carolina in 1787.

The task of interpreting, applying and enforcing the provisions of the Constitution is not, of course, a simple task. The right of litigants to raise constitutional questions, the duty of the court to confine the exercise of its power to juridical as distinguished from political matters, and the handling of facts in connection with the constitutional questions raised—all of these present questions of grave difficulty, the answers to which, as given by the Supreme Court, have varied from time to time. Even the interpretation to be given the language of the Constitution is not fixed and definite as are the rules of mathematics, but such interpretation is to be made in the light of history and the changing conditions of the times with such help as may be had from prior decisions. It must always be borne in mind that it is a charter of government that is being interpreted, not a mere contract or statute, and that its meaning is to be ascertained, not merely by inquiring what was in the minds of its framers, but by considering the principles which it embodies in the light of the history of the nation and the needs of the social organism. The thought was well expressed by Chief Justice Hughes in *Home Building & Loan Association* v. *Blaisdell*, 290 U. S. 398, 442, where he said:

> It is no answer to say that this public need was not apprehended a century ago, or to insist that what the provision of the Constitution meant to the vision of that day it must mean to the vision of our time. If by the statement that what the Constitution meant at the time of its adoption it means today, it is intended to say that the great clauses of the Constitution must be confined to the interpretation which the framers, with the conditions and outlook of their time, would have placed upon them, the statement carries its own refutation. It was to guard against such a narrow conception that Chief Justice Marshall uttered the memorable warning—"We must never forget that it is *a constitution* we are expounding" (McCulloch v. Maryland 4 Wheat. 316, 407)—"a constitution intended for ages to come, and consequently, to be adapted to the various crises of human affairs". Id., p. 415. When we are dealing with the words of the Constitution, said this Court in Missouri v. Holland 252 U. S. 416, 433. "we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. . . . The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago."

The book under review presents a systematic analysis by a group of experts of the Supreme Court's enforcement of constitutional limitations for the 150-year period following *Marbury* v. *Madison*. While we may not agree with all of their conclusions, they have rendered a real service in the analysis they have made and in the light which they throw upon what is properly considered the most important work of the American judiciary. Of special interest, I think, is Mr. Curtis' adaptation to the law of the Constitution of Whitehead's concept of law as immanent, which is but another version of Cicero's idea that law arises out of the nature of things. Mr. Curtis sees the need for what he calls an immanent order as well as for one imposed by authority, and he concludes his lecture with this eloquent passage:

> Our hopes do not rest on the Constitution, nor on the law, nor on our courts. Our hopes rest on something among us, which we have made articulate only in part. They are false hopes only if they are not evoked and expressed, only when they have not been explained, rationalized, understood and acknowledged. We must carry them across the dark gap between the implicit and the explicit. What we sense but darkly must be said clearly for our salvation. This, it seems to me, is what John Marshall did for us in the case of Marbury v. Madison. He snatched from the majority and offered to our courts, the function of rendering our political decencies and aspirations into immanent law. What we owe to Marshall is the opportunity he gave us of combining a reign of conscience with a republic.

The book is not one which the ordinary reader will enjoy, for an intelligent reading presupposes a considerable knowledge of constitutional history as well as of the decisions of the Supreme Court. Those who are interested in constitutional history or political theory, however, will find in it much that is informative and thought-provoking.

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OFFICE MANAGEMENT MANUAL FOR LEGAL AID SOCIETIES. *By Junius L. Allison. Chicago: Public Administration Services. 1953. $2.00. Pages vii, 109.*

As the author points out in his informative introduction, this manual was compiled because of the increasing number of legal aid societies in the United States and the development of existing societies into more clearly defined law offices. It is a collation of the tested and tried techniques and procedures for legal aid administration, gathered from the 125 existing legal aid units throughout the country.

This is a "how to" book and spells out in definite and clear detail how to operate small, medium and large legal aid offices and law school clinics. It deals with such everyday problems as making the file, the mail, docket books, the first interview, subsequent interviews, financial transactions, personnel, and the attorney's case record.

Though designed primarily for legal aid lawyers, this systematic law office management manual could be of invaluable assistance to beginning attorneys who have not had the valuable experience of "interning" in legal aid clinics. A law school graduate, inexperienced in conferring with the lay public, will find practical advice on interviewing the client. The author, senior attorney in the Chicago Legal Aid Bureau, and formerly an active practicing attorney and lecturer on social law, suggests:

> Recognize the most important factor in law practice: The client has come to you because he is in distress. He seeks your counsel because he believes you are skilled and proficient in matters of which he is entirely ignorant. Do not lecture or talk down to the client. Do not fire questions at the client like a machine gun. The interview is not a cross-examination. Use simple words. Confine the information you give to relatively few ideas. Make sure you sense the attitudes he holds because these will either block the discussion or keep the main problems out of it. The interviewer should be friendly and interested.

The beginning attorney will also find usable the detailed forms designed for an attorney's first interview in specified types of cases, for example: Adoption Information Form; Application for Divorce Action; Personal Injury Form; Personal Injury, Witness' Report; and Authorization for Medical Records and Reports.

This manual is an essential guide for a legal aid society whether it be a volunteer unit in a small community, a law school clinic, or a metropolitan legal aid office with a large staff of paid attorneys. It is well indexed, brief and yet comprehensive.

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THE LEGAL AID SOCIETY: NEW YORK CITY: 1876-1951. *By Harrison Tweed. Published by The Legal Aid Society, 11 Park Place, New York City. (Copies available on request) 1954. Pages ix, 122, with bibliography.*

In his usual incisive style, animated by his irrepressible spirit, Harrison Tweed has written this short book to recount the struggles and development of The Legal Aid Society during its first seventy-five years of serving as lawyer to the poor in New York City. The recital takes on added interest because the Society is the oldest legal aid organization in America and (so far as I am aware) the oldest in the entire world.

For Mr. Tweed this was a labor of love inasmuch as he had resigned as the Society's president in May, 1945, after VE Day when he became President of The Association of the Bar of the City of New York. On that occasion Franklin E. Parker, Jr., wrote:

> Our President has not only been wise and earthy and warm-hearted; he has often been profane. Out of his authorized profanity has come a guidance and response which have made the last few years of The Legal Aid Society truly significant.

All who work in the Legal Aid ranks, whether as officers, directors, or staff members, will want to read his book because its history is the prototype for all others. It has had its full share of woes; but it never departed from the idealism of its mission.

Certain statistics are of significance to economists and sociologists as well as lawyers. Although New York City has been steadily growing, the number of the Society's *civil* cases has been nearly constant at about 35,000 for more than a decade. This experience (which is confirmed by that in Boston) suggests that the need on the *civil* side is being satisfactorily met. Growth of population may be just about offset by the fact that so many persons are raising themselves out of the lower income brackets into somewhat higher brackets.

In sharp contrast, the volume of *criminal* cases more than doubled from 1946 to 1951 and is currently amounting to about 18,500 cases per year. The reason for this is that the Society has been able to extend its service: the need has always been there.

Costs of operations, which had to rise during our inflationary period, are defrayed by private gifts from citizens with the load fairly evenly divided between lawyers and laymen.

Members of the American Bar Association will find a painful reminder at page 53. In 1946, Mr. Tweed as chairman of the Standing Committee on Legal Aid Work felt constrained to state to the House of Delegates:

> Your committee believes that this may well be the last call to the American Bar Association to take the leadership in legal aid work and, by doing so, to win the gratitude and respect of the community. If this call to the American Bar Association goes unanswered, the small group of lawyers who have been the backbone of legal aid may turn to the civilian welfare agencies throughout the country to assume the leadership.

The day was saved by a few farsighted men in key positions. One was the chairman of the Budget Committee, William J. Jameson, now President of the Association.

Statesmen will wish to study Mr. Tweed's philosophic discussion concerning the future of legal aid—its

support and its control. While recognizing that some governmental support may prove necessary, his ideal is that legal aid may find its management in the legal profession and its financial support in the community. This he calls "Legal Aid—American Style".

Romanticists are advised to turn first to page iii and study the wording and typography of the Dedication.

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MERRILL ON NOTICE. *A Comprehensive Treatise on the Principles and Practice of Legal Notice. By Maurice H. Merrill. Kansas City, Missouri: Vernon Law Book Company. 1952. In three volumes, pages xl, 752; iv, 786; iv, 747.*

The American Bar has produced a number of outstanding legal writers. Any twentieth century list of such writers will have to include Dr. Merrill's name. There is no mistaking the fact that this work is outstanding and superior. It is the work of a perfectionist who knows his subject. It is thorough and comprehensive. The author disclaims writing an encyclopedia or digest. If by this he means that he has done more than cite cases for and against stated propositions, he is right. The work constitutes a critical examination and discussion of legal principles with a citation of authorities that is ample but not exhaustive.

Dr. Merrill began his work on this treatise in 1928. He chose to treat an everyday subject that has been long neglected. The concept of notice pervades the whole field of law, yet no articulated study on the subject has been made since *Wade on Notice* was last published in 1886. In this treatise the author follows the concept of notice in all its ramifications and contacts through the whole body of the law.

Necessarily, the author begins with a critical analysis of the terminology of notice. No subject can be discussed with discrimination if terms are used like blank checks, and "jigger" can mean anything from a measure to a feather duster or a constellation. Hence, the author sets out some terms by means of which components and concepts can be distinguished one from another. I hasten to add, however, that the user of the work will not have to familiarize himself with a glossary of esoteric terms in order to use this work. The introductory chapter of twenty-four pages and a glance at the table of contents (which incidentally reflects an excellent organization of the subject matter) will orient the user and furnish him with almost self-explanatory terms that will enable him to think clearly in a field where ignorance, loose terminology, and fuzzy thinking abound.

What is meant by "constructive notice"? Is it synonymous with imputed notice? Those who think the term is a word of art should read Section 17. What is the difference between absolute, implied, imputed and presumptive notice? What is "unforgettable knowledge"? All these questions and more are answered in the short introductory chapter, with references to later portions of the work where the effect of the differences in legal matters is fully documented.

In describing the work, one is tempted to reprint the table of contents, but only a few features can be mentioned here. The work is divided into four parts. The first part consists of one short introductory chapter in which terms are defined and the anatomy of notice is considered. It should be read by every lawyer. It will open the windows of his mind. This is followed *seriatim* by a discussion of cognitive notice (Part II), absolute notice (Part III), and vicarious notice (Part IV).

The discussion of cognitive notice concerns the cases in which a person is deemed to have notice of fact *X* because he knew fact *Y*, or is deemed to have notice of some ultimate fact because he was aware (or ought to have been aware) of certain inquiry-provoking physical conditions, conduct, document, event or transaction. The circumstances that impose or relieve from the duty to inquire are examined, as is also the sufficiency of compliance with the duty where it exists. The text indicates that the circumstances which put people on inquiry are far more numerous and diverse than most lawyers realize. The discussion of cognitive notice, when combined with the author's treatment of record notification in connection with real estate transactions, makes this work practically indispensable to the real estate lawyer. The treatment of these two topics is outstanding. Nothing in the standard works on real property and titles comes near this treatise in dealing with that subject. Real estate lawyers who do not add this treatise to their libraries will deprive themselves of the best medium in the field. The section on *lis pendens* is also excellent and up to date.

The treatment of record notification is found in Part III under the general head of absolute notice. Absolute notice, of course, is not confined to real estate matters. It covers the situations in which the law imposes on one person a duty to know and on another a concomitant duty to inform or make knowledge available. These duties may arise out of custom, contract or statute. The sources of the duty, the permissible means of notification, the time and formal requisites thereof are all treated. In this part of the work, Chapter 9 on "Unforgettable Knowledge" deserves special mention. Anyone who starts reading it will not lay the book aside until he has finished the chapter. Also in this section, the discussion of "Emanation of Notification" (Section 578 *et seq.*) treats an important but often neglected facet of the law.

The late William Draper Lewis once stated that it cost the American Law Institute at least $10,000 to formulate Sections 9, 10 and 11 of the *Restatement of Agency* dealing with knowledge and notice. Experts in all fields of the law were called in for the purpose. Its importance justified the time, care, talent and money expended. The subject is, of course, included in this work, largely in Part IV under

the general heading of vicarious notice. Here there is a discussion of principles, cases, and views with the citation of cases. And it is well done.

The specific mention of some parts of this work could raise the implication that other parts are not so good. The reviewer disclaims such an implication. The work is excellent throughout. Because it runs to three volumes, some may think this is another instance of a small segment of the law spread thin. It is not. Treatment of a pervasive concept is here compressed into relatively small space. Very few writers say more with fewer words. The manuscript has obviously been revised with care. It is concise, terse, pithy and compendious. Scholarly works are often dull, hard reading. This is not. It has good literary style and flavor.

Coverage is indicated by a table of cases that runs to 289 pages in six-point type. These cases are cited with discrimination. They are accurately and soundly analyzed. The principles involved are critically examined. Conflicting views are noted and appraised. The reasons for preferring one view over another are stated. So also, where the author predicts the probable course of development, he states his reasons therefor. A feature of the citations that will be appreciated by many is the frequent addition of a parenthetic statement indicating the nature of the case cited. Internal cross references augment a good index of 113 pages running from abandonment to zoning. Lastly, the publisher deserves commendation for excellent typography, paper and binding.

The unusually high quality of this treatise as disclosed by his day-to-day use of it has so impressed the reviewer that its excellence cannot be adequately reflected in this brief review.

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BROADMOOR: A HISTORY OF CRIMINAL LUNACY AND ITS PROBLEMS. *By Ralph Partridge. London: Chatto and Windus. 1953. Price: $4.00. Pages vi, 278. Distributed in the United States by John De Graff, Inc., New York.*

There are few problems more perplexing than that of the disposition of insane criminals. Although it is generally agreed that there are instances in which criminals are so mentally deranged that they cannot properly be considered responsible for their acts, there is still disagreement as to the disposition which should be made of such individuals. In addition, there is considerable debate as to the standards which are to be applied in determining legal responsibility for crimes. This book relates how the problem of the criminally insane is handled in England, describing in detail the history and operation of England's hospital for insane criminals.

The author opens this book with a discussion of the legal aspects of insanity, tracing the background for the statutory provisions under which the criminally insane are committed to Broadmoor, citing the Act of 1800 which provided that all persons acquitted on the grounds of insanity, or found to be insane on arraignment, could be ordered to be detained in close custody "until Her Majesty's pleasure be known". In 1893 an act was passed which introduced the controversial and, apparently, inconsistent verdict known as "Guilty but Insane". Even though insanity is not often pleaded except in capital offenses, recommendations had been made by 1807 to erect a building in which to confine persons committed under these acts. Broadmoor, which has a bed capacity of 1000, with a staff of about 300, began receiving patients in 1863.

In his discussion of legal insanity, the author gives a somewhat superficial criticism of the M'naghten Rules for determining sanity. He points out that these rules, which were formulated in 1843, have shortcomings in that they are not completely consistent with present day medical concepts of insanity. However, he notes that there is some basis for the rules having stood the test of time, and states "but fortunately the wording permits a certain latitude of interpretation, and has allowed the lawyers some grounds for manoeuvre". He quotes Lord Haldane as having stated that he had never heard of the M'naghten Rule embarrassing any judge, when justice required an acquittal.

In the chapter on "Medical Insanity", the author describes various types of mental illness and stresses the relationship between insanity and crime, in particular, homicide. He presents a number of interesting case histories of insane criminals who have been committed to Broadmoor. His case material illustrates the difficulties which are encountered in the diagnosis of mental illness and also in ascertaining responsibility. The cases also point to the difficulties inherent in formulating acceptable definitions of legal sanity. The author concludes that the differences between legal and medical concepts of insanity will only be resolved when these conditions can be defined in terms which are acceptable to both the medical and legal professions.

The detailed and intimate description of the history of Broadmoor and of the development of its progressively improved and humane program for the treatment of its patients makes up the nucleus of this absorbing book. The reader is taken through several generations and shown how changing attitudes have slowly modified the treatment program in this institution. The book describes the difficulties which have been encountered in maintaining safe custody of potentially dangerous individuals and, at the same time, in attempting to create a relaxed atmosphere in which these mentally ill individuals could be successfully treated. The author shows how these problems have been overcome by developing a program in which patients are encouraged to participate regularly in various types of occupational, recreational and social activities. This treatment program has made Broadmoor an institution with a warm community spirit, where efforts are directed toward restoring the patient's sanity and returning him to

society. Careful plans have been made for the follow-up of released patients in order to insure public safety.

Broadmoor is a tribute to the devoted workers who have shouldered the difficult and often thankless task of caring for criminally insane individuals, many of whose offenses arouse only fear, antipathy and repugnance in the minds of the public at large. This book may be read with profit and enjoyment by legislators, jurists, lawyers, physicians and others interested in the problem of the disposition of the criminally insane.

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ADMINISTRATIVE LAW *By Kenneth Culp Davis. St. Paul: West Publishing Co. 1951. Pages xvi, 1024.*

Though Professor Davis's book was published in 1951 it is well to review it now that there has been time to assess its value. In 1951, it was awarded the Gerard Henderson Prize for the best book concerning administrative law in the previous five-year period. The book is a compact, single volume. It is devised in part for students. But like Dean Prosser's hornbook on *Torts* it is in fact a full-fledged, tightly packed treatment of the subject. It reflects the now accomplished maturity and complexity of the subject. This reviewer has been impressed by the serviceability of the book as a tool for research in the solution of problems, and for that reason it would appear to be particularly well adapted for the practitioner.

The book is primarily concerned with federal administrative law in the sense that the judicial material is predominantly federal, though in some fields—the writs of mandamus and certiorari, for example—the state decisions are canvassed. The state courts are, however, apt to follow the lead of the federal courts in dealing with the principal doctrines of administrative law and where there are significant variations the author has dealt with them.

The strength of this treatise lies in the meticulous, well-reasoned treatment of the decisions and the detailed analysis of the Administrative Procedure Act. Professor Davis is a friend of the administrative process but not an undiscriminating one nor an apologist for its excesses. Administrative procedure must serve two equally valid ends: the whole-hearted furthering of the statutory purposes and the protection of the individual against the unwarranted exercise of administrative power. Professor Davis maintains an exemplary balance between these two objectives. He explores fully the right to hearing, the presentation of evidence, the evaluation of evidence and the making of findings. He is not one of those who would set up technical obstacles to securing judicial review. Readers of this JOURNAL may remember that he has been critical of postponing judicial review by the kind of insistence on case or controversy or "ripeness" which looks to the form of administrative action rather than to its practical effects. He is nearly at all points a proponent of a balanced system, of an adjustment between agency and court which recognizes generously the appropriate function of each.

Mr. Davis believes that some of the demands made in the name of fair procedure unnecessarily hamper the valid use of administrative "expertise" and reduce disproportionately the efficiency of the administrative process. There are times when the reader may feel that his readings of certain provisions of the Administrative Procedure Act are somewhat distorted by this conviction. But though their conclusions may arise from a slightly different point of view, lawyers and judges, too, are coming to see that they have a stake in the efficiency of the administrative process; delays and complexity add heavily to the costs of litigation and impede the conduct of business. It is the judges and the bar associations which have initiated the current President's Conference on Administrative Procedure designed to increase its efficiency and speed, and reduce large records and consequent expense. In any case, Professor Davis's occasional preoccupations add to the value of his book; his enthusiasm for his subject gives it a lively as well as a scholarly tone. Because he is a scholar and a teacher, Mr. Davis treats the important cases fully and accurately. When you agree with him, you are given strong arguments to support your conviction; when you disagree, you are in a position to gauge the strength of the contrary arguments and thus to test the soundness of your own position.

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Books Received

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State Laws on the Employment of Women. By Edith L. Fisch and Mortimer D. Schwartz. Washington: The Scarecrow Press. 1953. $7.50. Pages 377.

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Review of Recent Supreme Court Decisions

George Rossman
Editor-in-Charge

ANTITRUST LAW

Sherman Act Suit Against Local Trade Association Improperly Dismissed

■ *United States* v. *Employing Plasterers' Association of Chicago*, 347 U. S. 186, 98 L. ed. (Adv. p. 365), 74 S. Ct. 452, 22 U. S. Law Week 4154. (No. 440, decided March 8, 1954.)

This was a civil action under Section 1 of the Sherman Act, charging a local respondent trade association, a local of the plasterers' union and individuals with combinations in restraint of trade. The Supreme Court reversed the District Court's dismissal for want of a cause of action.

The Government alleged that the respondents, who handle about 60 per cent of the plastering contracting business in Chicago, had "acted in concert to suppress competition among local plastering contractors, to prevent out-of-state contractors from doing any business in the Chicago area and to bar entry of new local contractors without approval by a private examining board set up by the union". This was alleged to be a restraint of interstate commerce since substantial quantities of materials for use in the industry are shipped into Illinois from other states.

The District Court considered the allegations to be "wholly a charge of local restraint and monopoly", not reached by the Sherman Act.

Mr. Justice BLACK spoke for the Court. The Court declared itself "not impressed by the argument that the Sherman Act could not possibly apply here because the interstate buying, selling and movement of plastering materials had ended before the local restraints became effective. Where interstate commerce ends and local commerce begins is not always easy to decide and is not decisive in Sherman Act cases."

The Court also said that the union's contention that the Clayton Act immunized it from prosecution for Sherman Act violations "has no merit under the allegations . . . because they show, if true, that the union and its president have combined with business contractors to suppress competition among them".

Mr. Justice MINTON, joined by Mr. Justice DOUGLAS, wrote a dissenting opinion in which he argued that the conspiracies complained of are wholly intrastate. Building is not commerce within the meaning of the Sherman Act, the dissent maintains, and interstate commerce here ends when the plaster and lath reach the building site.

The case was argued by Charles H. Weston for appellant, Thomas M. Thomas for appellee Employing Plasterers Association and Daniel D. Carmell for appellee Journeymen Plasterers' Union.

ANTITRUST LAW

Sherman Act Suit Against Local Trade Association Improperly Dismissed

■ *United States* v. *Employing Lathers Association of Chicago and Vicinity*, 347 U. S. 198, 98 L. ed. (Adv. p. 368), 74 S. Ct. 455, 22 U. S. Law Week 4157. (No. 439, decided March 8, 1954.)

This was a civil action under the Sherman Act brought against a local association of lathing contractors, a local labor union of lathers and individuals, alleging a restraint of trade on facts similar to those in No. 440, *supra*.

The Supreme Court, speaking through Mr. Justice BLACK, again reversed the District Court, which had dismissed the case on the ground that there was no cause of action on which relief could properly be granted. The Court said that the reasoning of the Plasterers' case applied here as well.

The case was argued by Charles H. Weston, for appellant, Leo F. Tierney for the Employing Lathers Association, and Lester Asher and Nathan M. Cohn for appellee Local 74.

COMMERCE

State Tax on "Gathering" Natural Gas Held To Burden Interstate Commerce

■ *Michigan-Wisconsin Pipe Line Company* v. *Calvert, Panhandle Eastern Pipe Line Company* v. *Calvert, Michigan-Wisconsin Pipe Line Company* v. *Calvert, Panhandle Eastern Pipe Line Company* v. *Calvert*, 347 U. S. 157, 98 L. ed. (Adv. p. 342), 74 S. Ct. 396, 22 U. S. Law Week 4115. (Nos. 198, 199, 200 and 201, decided February 8, 1954.)

A state tax on "gathering" natural gas violates the commerce clause of the Constitution when it is applied to a pipeline company which purchases the gas from a Texas producer and sends it directly into interstate commerce. That was the holding of the Court in this case.

Appellants are the owners of pipelines that run from Texas to other states. They sell no gas in Texas nor do they produce any gas. They purchase their supply from another company which collects the gas from its wells, pipes it to a gasoline plant for processing, whence it flows through gas meters directly into appellants' pipelines, which carry it in a steady continuous flow to consumers outside of Texas. The state courts held the taxable incident to be the

Reviews in the issue by Rowland L. Young.

"taking" of the gas from the gasoline plant into the pipelines.

Speaking through Mr. Justice CLARK, the Supreme Court unanimously reversed a holding by the Texas Court of Civil Appeals that the tax was constitutional. Pointing out that the "taking of gas", which was the taxable event, occurred after the gas has been produced, gathered and processed, the opinion declared that this process is "inherently unsusceptible of division into a distinct local activity capable of forming the basis for the tax here imposed, on the one hand, and a separate movement in commerce, on the other." This distinguished the case from *Utah Power and Light Company* v. *Pfost,* 286 U. S. 165, 76 L. ed. 1038, 62 S. Ct. 548 (1932), which involved a license tax on the generation of electricity in Idaho for transmission to Utah. Generation and transmission were different functions, the Court said.

The cases were unusual in that each appellant was appealing twice from decisions in favor of the same appellees. This happened because appellants were uncertain whether the Court of Civil Appeals or the Texas Supreme Court was the "highest court of a State in which a decision could be had" within the meaning of 28 U.S.C. §1257. The Court of Civil Appeals had held for appellees, and the Texas Supreme Court "refused" appellants' applications for writs of error. Appellants had appealed from both courts. The Supreme Court settled the jurisdictional question by holding that the appeals were properly from the Court of Civil Appeals. Accordingly, it dismissed the appeals in Nos. 199 and 201, while reversing in Nos. 198 and 200.

The cases were argued by D. H. Culton and Samuel A. L. Morgan for appellants and by W. V. Geppert and John Ben Shepperd for appellees.

CRIMES

Attempt To Bribe Jury

■ *Remmer* v. *United States,* 347 U. S. 227, 98 L. ed. (Adv. p. 388), 74 S. Ct. 450, 22 U. S. Law Week 4142. (No. 304, decided March 8, 1954.)

An alleged attempt to bribe the foreman of the jury that convicted petitioner of income tax evasion led the Supreme Court to vacate the judgment in this case.

The alleged bribe attempt was reported by the juror to the judge, who informed the prosecuting attorneys. An FBI report was requested, and the judge and the prosecutors decided that the attempted bribe was a jest and that nothing need be done about the matter. Petitioner did not learn of the incident until after his conviction.

The Supreme Court ordered the judgment vacated and the case remanded to the District Court for a hearing to determine whether the incident was harmful to petitioner.

The Court spoke through Mr. Justice MINTON, the opinion stating that any private communication with a juror during a trial about the matter pending before the jury was presumably prejudicial. Although the presumption is not conclusive, a heavy burden rests upon the Government to show "after notice to and hearing of the defendant, that such contact with the juror was harmless".

The CHIEF JUSTICE took no part in the consideration or decision of the case.

The case was argued by J. Louis Monarch for petitioner and by Philip Elman for the respondent.

DECLARATORY JUDGMENTS

Suit by Resident Aliens Dismissed for Want of Case or Controversy

■ *International Longshoremen's and Warehousemen's Union, Local 37* v. *Boyd,* 337 U. S. 222, 98 L. ed. (Adv. p. 385), 74 S. Ct. 447, 22 U. S. Law Week 4143. (No. 195, decided March 8, 1954.)

This was an action by the union and several of its alien members for an injunction and a declaratory judgment against the District Director of Immigration. The union has over 3,000 members who are domiciled in the United States but who work every summer in the herring and salmon canneries of Alaska. They sought a construction of Section 212(d) of the Immigration and Nationality Act of 1952, which would have prevented the Director from treating the resident aliens returning from their summer work in Alaska as if they were aliens entering the United States for the first time. The complaint alleged that if the aliens were excluded their "contract and property rights [would] be jeopardized and forfeited".

Speaking through Mr. Justice FRANKFURTER, the Supreme Court held that the action should be dismissed for want of a "case or controversy". The Court said that the suit was "an endeavor to obtain a court's assurance that a statute does not govern hypothetical situations that may or may not make the challenged statute applicable". This was said to be "too remote and abstract an inquiry for the proper exercise of the judicial function".

Mr. Justice BLACK, joined by Mr. Justice DOUGLAS, dissented, declaring that the Director had announced that the workers going to Alaska would be subject to examination and exclusion upon their return. This was a suit, the opinion said, to test the right of the Director to apply Section 212 (d) (7) to these aliens.

The case was argued by A. L. Wirin for appellants and by Charles Gordon for appellees.

EVIDENCE

Use of Illegally Obtained Evidence in State Courts

■ *Irvine* v. *California,* 347 U. S. 128, 98 L. ed. (Adv. p. 324), 74 S. Ct. 381, 22 U. S. Law Week 4119. (No. 12, decided February 8, 1954.)

In this case, the Court was again called upon to consider the validity of a state conviction that rests upon evidence obtained by an illegal search and seizure.

The police suspected Irvine of illegal bookmaking. They had a locksmith make a key to his home while he and his wife were both away. Using the key, they entered, con-

cealed a microphone in the hall and bored a hole in the roof so that the microphone could be attached to a nearby garage. They twice entered the home to move the microphone, first to the bedroom and then to a closet. All this was done surreptitiously and without a warrant. The evidence obtained by use of the hidden microphone was used to convict the petitioner.

The Court affirmed the conviction over the strong dissents of four Justices.

Mr. Justice JACKSON announced the judgment of the Court and an opinion in which the CHIEF JUSTICE, Mr. Justice REED and Mr. Justice MINTON joined. This opinion cites *Wolf* v. *Colorado,* 338 U. S. 25, 93 L. ed. 1782, 69 S. Ct. 1359, in which the Court held that the Fourteenth Amendment does not forbid the admission in a state court of illegally obtained evidence. The opinion declared that *Rochin* v. *California,* in which a conviction was upset because of the coerced use of a stomach pump, was distinguishable, and set forth reasons why the *Wolf* case should not be overruled.

The opinion also disposed of another of petitioner's contentions. The state courts had also admitted petitioner's application for a federal wagering tax stamp. The opinion said that the federal statute neither makes such records confidential nor confers a license to conduct a wagering business.

Speaking for himself and the CHIEF JUSTICE, Mr. Justice JACKSON made the suggestion that the clerk of the Court be instructed to send a copy of the record of the case to the Attorney General for possible prosecution of the police involved in the search and seizure. This suggestion was vehemently rejected by Mr. Justice BLACK in his dissenting opinion.

Mr. Justice CLARK's concurring opinion, concurring "with great reluctance", took the position that, while he would not have voted on the side of the majority in the *Wolf* case when it was decided, he thought that the Court was bound by that decision.

Mr. Justice BLACK, joined by Mr. Justice DOUGLAS, dissented on the ground that petitioner had been forced to give evidence against himself in the application for a federal wagering tax stamp and that use of such evidence was a violation of the Fifth Amendment.

Mr. Justice FRANKFURTER, joined by Mr. Justice BURTON, wrote a dissenting opinion. He took the position that the conviction was a violation of due process under the doctrine of *Rochin* v. *California,* distinguishing *Wolf* v. *Colorado.*

Mr. Justice DOUGLAS also wrote a dissenting opinion, asserting that the judgment approved a lawless invasion of privacy. "Exclusion of evidence is the only effective sanction" against illegal police methods, he declared.

The case was argued by Morris Lavine for petitioner and by Elizabeth Miller and Clarence A. Linn for respondent.

GOVERNMENT CONTRACTS

Minimum Wage Schedule in Government Contract Is Not a Warranty as to Prevailing Wages

■ *United States* v. *Binghamton Construction Company, Inc.,* 347 U. S. 171, 98 L. ed. (Adv. p. 355), 74 S. Ct. 438, 22 U. S. Law Week 4152. (No. 65, decided March 8, 1954.)

This case presented the question whether a schedule of minimum wage rates included in a Government construction contract is a representation or warranty as to the prevailing wage rates in the area. The Court held that it is not.

The schedule of wage rates, furnished by the Secretary of Labor, was included, as required by the Davis-Bacon Act, in a contract for construction of a flood control project on which respondent was the highest bidder. Inadvertently, the wage schedule was too low, and respondent brought this action in the Court of Claims seeking damages for misrepresentation. The court held that respondent was entitled to rely on the schedule "as the Secretary's *latest* determination—as a representation of the wages it would have to pay when the work was to be done". Respondent was awarded $7,363.22, the difference between the rates specified in the schedule and the correct rates as later determined by the Secretary.

In reversing, a unanimous Court spoke through the CHIEF JUSTICE. The Court said that the Davis-Bacon Act was not intended to benefit contractors, but rather to protect their employees, and that there was no representation that rates set forth in the schedule were the prevailing rates. The Court pointed out that the contract itself speaks only of "wage rates not less than those stated in the specifications", while the specifications refer to "minimum wage rates applicable in the locality". While the statute itself provides that the minimum wage rates are to be "based upon. . .the wages. . . determined by the Secretary of Labor to be prevailing", this provision cannot be converted into a representation that the contractor will not have to pay higher rates, the Court held.

The case was argued by Warren E. Burger for petitioner and by Jerome Beaudrias for respondent.

GOVERNMENT CONTRACTS

Validity of State Sales Tax on Goods Sold for Government Contracts

■ *Kern-Limerick, Inc.* v. *Scurlock,* 347 U. S. 110, 98 L. ed. (Adv. p. 313), 74 S. Ct. 403, 22 U. S. Law Week 4134. (No. 115, decided February 8, 1954.)

A state sales tax cannot be imposed upon the sale of tractors to a contractor that holds a cost-plus contract with the Federal Government. This decision rests upon an interpretation of the Armed Services Procurement Act of 1947 and a distinguishing of *Alabama* v. *King and Boozer,* 314 U. S. 1, 86 L. ed. 3, 62 S. Ct. 43.

Certain private contractors procured two tractors in Arkansas for use in construction of a naval ammunition depot in that state. Their contract with the Department of the

Navy was of the cost-plus-a-fixed-fee variety and was entered into under the authority of Section 2 (c) (10) and 4 (b) of the Procurement Act. The Arkansas Supreme Court, sustaining the validity of a state sales tax on the tractors, denied that the United States was the purchaser and held that the Procurement Act did not authorize the Navy to delegate power to make purchases to private persons.

Mr. Justice REED reversed for the Supreme Court, holding that the purchases were constitutionally immune from state taxation. The Court said that, since Sections 4(a) and (b) of the Act authorize contracts of any type that "will promote the best interests of the Government", the contracting officers were free to follow business practices, which include the use of private purchasing agents. The Court denied the argument that naming the Government as the purchaser was colorable only and left the contractor the real buyer. The Court pointed to express language in the request for bids and the purchase order that states that the purchase was made by the Government and that the Government was obligated for the purchase price. The Court distinguished *Alabama* v. *King and Boozer* on this point.

Mr. Justice BLACK wrote a dissenting opinion in which the CHIEF JUSTICE and Mr. Justice DOUGLAS joined. This opinion took the view that there was no statutory authorization for the delegation of power to make Government purchases to private persons.

Mr. Justice DOUGLAS wrote a dissenting opinion in which the CHIEF JUSTICE and Mr. Justice BLACK joined. This opinion held that the contractor was the user of the tractors and hence liable for the tax under state law. "If the *economic burden* of the tax falls on the federal government, it falls there because the government assumed it by contract, not because Arkansas placed it there."

The case was argued by H. Brian Holland for appellant and by O. T. Ward for appellee.

JUDGMENTS

Doctrine of Collateral Estoppel

■ *Partmar Corporation and Fanchon and Marco, Inc.* v. *Paramount Pictures Theatres Corporation*, 347 U. S. 89, 98 L. ed. (Adv. p. 301), 74 S. Ct. 414, 22 U. S. Law Week 4128. (No. 17, decided February 8, 1954.)

In a tangled fact situation, in which Paramount found itself in the anomalous position of attempting to prove that it had violated the antitrust laws, the Supreme Court applied the doctrine of collateral estoppel by judgment in affirming dismissal of a counterclaim for treble damages under the Sherman Act.

Somewhat simplified, the facts were these: In 1939 Paramount leased a theater in downtown Los Angeles to the petitioners, along with a so-called "film franchise agreement", which licensed Partmar to exhibit Paramount pictures as first runs. In 1946, in *United States* v. *Paramount Pictures, Inc.*, 334 U. S. 131, 68 S. Ct. 915, 92 L. ed. 1260, Paramount, along with other producers of motion pictures, was found guilty of a conspiracy to violate the Sherman Act. One provision of the decree entered in that case enjoined each of the defendants "from further performing any franchise to which it is a party. . . ." Paramount thereupon notified Partmar that it was canceling the franchise agreement and terminating the lease. Partmar refused to vacate the theater, and Paramount instituted this action in the federal district court, alleging diversity and unlawful detainer of the theater. Partmar answered, setting up various defenses and counterclaiming for treble damages, charging that it was damaged by the terms of the lease as a result of the same conspiracy stated in the complaint in *United States* v. *Paramount Pictures, Inc.* The suit for ouster and the counterclaim for treble damages were ordered tried separately. In 1948 the Supreme Court handed down its judgment on Paramount's appeals from the decree in *United States* v. *Paramount Pictures, Inc.*, saying, *inter alia*, that the franchises were not illegal *per se*. Relying on that, Partmar then sought to have Paramount's suit dismissed. The District Court for the Southern District of California held that the agreements were not illegal, thus ruling that Paramount was not entitled to possession of the theater and dismissing Partmar's counterclaim for treble damages. Partmar appealed the decision on the counterclaim.

The Court affirmed in an opinion written by Mr. Justice REED. In holding that the doctrine of collateral estoppel applied to the counterclaims, the Court pointed out that the holding of the District Court that neither the lease nor the franchise was the result of "any agreement, combination or conspiracy of any kind whatsoever". This finding, the Court said, was necessary to the District Court's judgment that the agreements were not illegal. Partmar had had ample opportunity upon trial to present evidence and to contest the conspiracy finding, which determined the key ingredient of Partmar's counterclaims. A separate trial would have been improper, the Court added, because the judgment entered on the right to possession of the theater was a "final disposition of the determinative issue on the counterclaims".

Mr. Justice JACKSON and Mr. Justice CLARK took no part in the consideration or decision of the case.

The CHIEF JUSTICE, joined by Mr. Justice BLACK, wrote a dissent, which took the position that the issue in the eviction suit was the validity of the lease and that the issue of the conspiracy alleged in the counterclaims had never been litigated. The dissent said that Partmar was being penalized because Paramount had failed to prove its case on the eviction suit.

The case was argued by Russell Hardy for petitioners and by Jackson W. Chance for respondents.

What's New in the Law

The current product of courts, departments and agencies

George Rossman • EDITOR-IN-CHARGE
Richard B. Allen • ASSISTANT

Administrative Law . . . hearing examiners.

■ What is the effect of §5(c) of the Administrative Procedure Act [5 U.S.C.A. §1004 (c)] providing that "the same officers who preside at the reception of evidence . . . shall make the recommended decision or initial decision . . . except where such officers become unavailable to the agency"?

The Court of Appeals for the Eighth Circuit has held that the provision does not make it mandatory for an agency to recall for the purpose of making a recommended decision a hearing examiner who reached mandatory retirement age after hearing the evidence and before making a decision, but that the agency should grant a *de novo* hearing if the substitute examiner must make decisions substantially relating to credibility of witnesses whom he has neither seen nor heard.

The original examiner reached 70 after briefs had been submitted to him and oral argument had. He was thus automatically retired under the Civil Service Retirement Act [5 U.S. C.A. §715] and the agency replaced him as to the instant case with an examiner who, oddly enough, was 76. The original examiner, in fact, was immediately re-employed for two brief periods by the agency and was thereafter employed by another agency as a trial examiner.

The Civil Service Retirement Act also provides that a retired person may be rehired if "the appointing authority determines that he is possessed of special qualifications". In this connection the Court held that the agency had an absolute right, free from judicial interference, not to recall the original examiner.

But, the Court continued, the Administrative Procedure Act manifested a feeling by the Congress that credibility evaluation of witnesses was an important factor, and thus the Court ruled that, in instances where it appeared that initial hearing-examiner findings and decisions must necessarily be the result of credibility evaluation of witnesses, there could be no substitution of examiners in mid-stream.

(Gamble-Skogmo, Inc. et al. v. *FTC,* C.A. 8th, February 25, 1954, Johnsen, J.)

Armed Forces . . . Doctors Draft Act.

■ The Court of Appeals for the Fourth Circuit has held that, while the Armed Forces may refuse to grant a commission to a dentist inducted under the Doctors Draft Act because of his past Communist Party affiliation, they cannot hold him in the service without commissioning him. Accordingly, the Court ordered the dentist's release from the Army in a habeas corpus proceeding.

On March 9, 1953, in *Orloff* v. *Willoughby,* 345 U.S. 83, the Supreme Court ruled that a doctor drafted and held in the rank of private was not entitled to judicial relief by way of a discharge from the service. At that time the applicable section of the Act [50 U.S.C.A. §454a] provided that a person inducted under the law "may" be promoted to a grade or rank commensurate with his professional ability.

Congress amended the section on June 29, 1953, to provide that a person inducted under the law "shall . . . be appointed, reappointed, or promoted to such grade or rank as may be commensurate with his professional education, experience or ability".

The Court ruled that the amendment went beyond merely equalizing promotional policies with respect to doctors and dentists in all of the Armed Forces. Reading the legislative history of the amendment, the Court said it was clear that it was the intention of Congress that persons drafted under the law be given the rank and grade of officers "so as to compensate them, as far as possible, for being taken away from the civilian practice of their professions".

The Court declared that it could not direct the granting of a commission and that the Army was within the scope of its authority in refusing a commission, but that the Army could not at the same time deny him his rank and hold him in service. "If not fit to be an officer", the Court observed, "he should be held not fit for the services for which he has been drafted and should be dismissed".

(Nelson v. *Peckham,* C.A. 4th, February 9, 1954, Parker, C.J.)

Constitutional Law . . . commerce.

■ An Illinois statute providing for suspension of a trucker's right to operate on the state's highways when habitual violation of maximum weight and load limits is established cannot be constitutionally applied to a federally certificated motor carrier to suspend its right to engage in interstate commerce over Illinois

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Editor's Note: **Virtually all the material mentioned in the above digests appears in the publications of the West Publishing Company or in The United States Law Week.**

highways, according to the Supreme Court of Illinois.

The Court did not discuss the burden on interstate commerce theory, but rested the decision on the supremacy of federal pre-emption of the field by the Federal Motor Vehicle Act [49 U.S.C.A. §301 *et seq.*]. The Court pointed out that in the preamble to the Act the Congress stated it was legislating "to the end of developing, coordinating and preserving a national transportation system by . . . highway. . . ." Such a system could not be maintained, the Court asserted, if an interstate carrier's operating rights are subject to state suspension for violation of load limits or other traffic regulations.

The statute withstood all constitutional challenges from an intrastate aspect and the Court, under a separability clause, allowed the statute to stand as applied to intrastate commerce. Too, the Court conceded that regulation of load limits was a proper field of state action, and indicated that the sanction of such a statute could be a fine, but not suspension of interstate operating privileges in the state.

(Hayes Freight Lines, Inc., v. *Castle et al.,* Sup. Ct. Ill., January 20, 1954, Schaefer, C.J., 117 N.E. 2d 106.)

Criminal Law . . . jury selection.

■ The custom in criminal trials of qualifying jurors for the death penalty by asking them if they have any scruples against capital punishment has withstood a challenge in the Court of Appeals for the Second Circuit.

The defendant contended that prejudicial error had been committed in the jury selection process because the judge repeatedly asked prospective jurors if they had "any scruples which arise from matters of faith, belief or religion, or matters of conscience" which would prevent them from returning a verdict carrying the death penalty. It was argued, moreover, that it was error for the trial court to excuse twelve talesmen who said they had such scruples.

The federal courts had jurisdiction in the case under 18 U.S.C.A. §1114 because the defendant had killed an FBI agent while the latter was engaged in official duties. This brought the possible punishment under the murder section of the federal code [18 U.S.C.A. §1111] which provides that anyone convicted of murder in the first degree "shall suffer death unless the jury qualifies its verdict by adding thereto 'without capital punishment' in which event he shall be sentenced to imprisonment for life".

The qualifying phrase "without capital punishment" was added to the statute in 1897, and prior to that time federal cases had held it proper to excuse prospective jurors who said they had scruples against capital punishment. The defendant in this case argued that the 1897 statute impliedly eliminated scruple or bias against capital punishment as disqualification for cause and that the statute sanctioned what he termed "balanced juries" which might properly include persons with capital-punishment scruples. He contended that since there is a substantial school of thought opposed to capital punishment, the elimination of those persons from the jury for cause resulted in an unbalanced jury not truly reflecting contemporary social thought.

Not so, the Court held. The statute could not have such a tendency, the Court said, because the defendant's "balanced jury" would in reality be a "partisan jury" because if it included those with scruples against capital punishment then it would also have to include those with bias in favor of capital punishment. Such a jury, the Court observed, could hardly be expected to reach a unanimous verdict as to punishment.

The Court examined state decisions and found three states which had interpreted similar statutes as not revoking a trial court's right to disqualify for scruples against capital punishment. The legislative history of the 1897 statute, moreover, was found not to support the defendant's contentions.

(U.S. v. *Puff,* C.A. 2d, March 3, 1954, Hincks, J.)

Federal Tort Claims Act . . . applicability.

■ The United States is not liable under the Federal Tort Claims Act for negligence of the Weather Bureau with respect to flood warnings. This is the decision of the Court of Appeals for the Eighth Circuit in denying actions under the Act by several Kansas City business firms who sought to recover for damages suffered during the floods of July, 1951.

The complaints generally alleged that the Government collected and maintained information regarding river stages and weather and knew that the public relied upon this information when disseminated. The complaints did not attempt to attach liability to the fact that the river overflowed, but rather that the Weather Bureau negligently assured the plaintiffs that it would not overflow and negligently failed to give a proper warning of the impending overflow.

The Court ruled that a section of the Flood Control Act of 1928 [33 U.S.C.A. §702(c)] providing that "no liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place" barred the present actions. In this connection the Court held that the Tort Claims Act did not repeal this section of the former law.

Moreover, the Court said, no action could exist under the Tort Claims Act because that act does not "create new causes of action where none existed before" [quoting from *Feres* v. *U.S.,* 340 U.S. 135].

But even further, the Court asserted, the Tort Claims Act itself contained two exceptions barring the actions. First is the exception as to any claim "arising out of . . . misrepresentation . . ." [28 U.S.C.A. §2680 (h)], applicable because the complaints alleged that misrepresentations regarding the possibility of flood waters were made. Second, is the exception [28 U.S.C.A. §2680

(a)] as to a claim based upon an act or omission of a governmental agent in the performance of a governmental function.

Two judges, concurring specially, did not discuss the exceptions in the Tort Claims Act, but preferred to rest the decision on the bar of the Flood Control Act and upon the absolute common-law policy that no tort liability attaches to either the Government or a private person regarding the accuracy of information disseminated to the public at large.

(National Manufacturing Co. et al. v. *U.S.,* C.A. 8th, February 8, 1954, Woodrough, J.)

Husband and Wife . . . crimes against property of spouse.

■ The common law rule that neither spouse can commit a crime against the property of the other is still the law of New York despite the fact that married women's acts secure a separate property right in a wife. The County Court of Kings County, New York, has so ruled in dismissing an indictment returned against a husband for larceny of his wife's property.

The Court observed that New York is a common law state and that the basis for the rule followed is found in the "unity of husband and wife". The statutory property rights emanating from the married women's acts relate solely to the creation and enlargement of civil rights and liabilities, the Court declared, and do not create criminal responsibility "where none such existed at common law".

The Court restated the familiar rule that criminal statutes are to be strictly construed and noted that the New York larceny statute does not specify that marital larceny is possible, and held that therefore the statute cannot supersede the common law. The Court noted that when the legislature intended to establish criminal responsibility upon a husband, such as in "compulsory prostitution of wife", it had specifically said so.

(People v. *Morton,* Co. Ct. Kings Co., N.Y., January 25, 1954, Leibowitz, J., 127 N.Y.S. 2d 246.)

Labor Law . . . religious corporation in interstate commerce.

■ A religious corporation may not rely upon the First Amendment to escape paying employees in its interstate-commerce printing plant the minimum wages prescribed under the Fair Labor Standards Act, according to the Court of Appeals for the Seventh Circuit.

The case concerned printing plant employees of the Pilgrim Holiness Church Corporation, organized as an Indiana religious corporation. More than half of the corporation's sales of printed materials were made to customers outside Indiana, and a little purely secular commercial printing was done.

The Court held that freedom of religion guarantees in the Constitution were neither applicable to the present case nor violated by forcing adherence of the defendant to the terms of the Act. While religion itself may not be commerce, the Court asserted, it does not follow that a religious corporation may not engage in "commerce" as defined by the Act. The Court stated, moreover, that application of the Act in the instant case did not "prohibit the free exercise of religion by the defendant nor does it lay a flat tax on the privilege".

The Court had no difficulty in finding that the printing activities were commerce under the Act's broad definition of that term [29 U.S.C.A. §203 (b)] that it means "trade, commerce, transportation, transmission, or communication among the several states or from any state to any place outside thereof".

(Mitchell v. *Pilgrim Holiness Church Corporation,* C.A. 7th, February 23, 1954, Swaim, J.)

Libel and Slander . . . libel by will.

■ The Supreme Court of Oregon in a case of first impression in the state has held that the victim of libelous per se language in a will may maintain an action for libel against the decedent's estate. Few American courts have ruled upon the question and it had not arisen under English common law.

The testator accused his grandson of squandering money he had previously given him, of deserting the testator by taking sides against him in a lawsuit and of being "a slacker, having shirked his duty in World War II".

Cases holding that there is no action for a libel by will have relied upon the hoary maxim that a personal action dies with the person. The Court found not only that the maxim lacked substantial validity in modern jurisprudence, but that it had no application to an instance of libel by will for the reason that the libel is not published until after the death of the testator and that therefore the tort for which the action is brought is not committed during the lifetime of the testator.

The defendants contended that in the probate of a will an executor acts as an officer of the court and that the court, rather than the executor, actually publishes the will. Arguing from this position, they asserted that such publication was absolutely privileged. But the Court ruled that the publication necessary to establish an action for libel occurs when the will is filed with the clerk of the probate court, and that this act necessarily antedates probate of the will.

(Kleinschmidt v. *Matthieu et al.,* Sup. Ct. Ore., February 10, 1954, Latourette, C.J., 266 P. 2d 686.)

Municipal Corporations . . . zoning.

■ Are constitutional freedom-of-religion guarantees violated by the application of a zoning ordinance requiring a specified amount of off-street parking area in connection with a church, when such application precludes erection of the church? The Supreme Court of Indiana, with two judges dissenting, has answered yes in a case involving the Jehovah's Witnesses sect.

The zoning ordinance involved provided for set-back lines and for off-street parking areas. The proposed church building was to be set back fourteen feet, whereas the ordi-

nance required 18.48 feet. The plans also provided for 2,244 square feet of off-street parking area, whereas under the ordinance the capacity of the church required 6,250 square feet.

The Court approved application of the set-back provision because it could not say that such application was arbitrary or capricious; neither would it prevent erection of the church. But as to the off-street parking requirement, the Court declared that the constitutional right to freedom of worship and assembly outweighed any benefit which the municipality had a right to secure under its police powers. The Court gave weight to the fact that three other churches in the neighborhood, although built before the zoning ordinance was enacted, caused on-street parking, and remarked "that it is rarely, if ever, that people entering or leaving a church cause or contribute to traffic accidents".

(Board of Zoning Appeals v. *Decatur, Indiana, Company of Jehovah's Witnesses,* Sup. Ct. Ind., February 1, 1954, Bobbitt, J., 117 N.E. 2d 115.)

Negligence . . . proximate cause.

■ The Supreme Court of Illinois has revisited Cardozo's exegesis of the law of proximate cause in the *Palsgraf* case [248 N.Y. 339] for assistance in determining whether the owner of a taxicab whose employee left it unattended with key in the ignition is liable to one whose automobile was struck by a fleeing thief who had stolen the taxi. The Court, with one judge dissenting, held that whether leaving the key in the ignition was the proximate cause of the injury was a fact question for the jury, and it therefore affirmed a plaintiff's judgment.

A purely common-law consideration of the proximate cause question was complicated by the existence of an Illinois statute providing that "no person driving or in charge of a motor vehicle shall permit it to stand unattended without first stopping the engine, locking the ignition and removing the key. . . ." But the Court asserted that whether the statute was an antitheft or a traffic regulation measure made no real difference; violation of the statute was prima facie evidence of negligence under Illinois law.

Having determined prima facie negligence, the Court then faced the question whether such negligence was the proximate cause of the injury. The Court conceded that the theft of the taxi amounted to an intervening force in the chain of causation, but ruled that it could not say that, as a matter of law, the intervening force was without the range of reasonable anticipation and probability.

(Ney v. *Yellow Cab Co.,* Sup. Ct. Ill., January 20, 1954, Maxwell, J., 117 N.E. 2d 74.)

Taxation . . . gamblers' tax.

■ Gambler Joseph Kahriger may have been unsuccessful in 1953 in his attempt to have the Supreme Court declare the federal occupational tax on gambling unconstitutional [345 U.S. 22], but the Court of Appeals for the Third Circuit has now directed his acquittal on two counts that he wilfully failed to register to pay the tax and that he wilfully failed to pay the tax.

The Court found that the trial court had convicted Kahriger of wilful violations of the statute [26 U.S. C.A. §§3290-3294]. This could not stand, the Court asserted, in the face of stipulated facts showing that he had failed to register because of his fear that he might incriminate himself by answering some of the questions appearing on the registration form furnished by the Collector. It was also stipulated that Kahriger had attempted to pay the tax but that payment had been refused unless he first registered.

While the Supreme Court had rejected the Fifth Amendment self-incrimination argument in the 1953 case, three justices dissented. Under these circumstances, the Court asserted, "it cannot be said that Kahriger's attitude was unreasonable", and therefore his refusal to register for the tax was not wilful.

(U.S. v. *Kahriger,* C.A. 3d, February 18, 1954, Biggs, C.J.)

Trade-Marks and Unfair Competition . . . chlorophyll.

■ The Court of Appeals for the Second Circuit says that chlorophyll products have attained such popularity that the word root "clor" is common to the chewing gum trade, and that the name "Clor-Aid" does not infringe the trade-marked name of "Clorets" used to identify a similar gum product.

But the Court, while denying trade-mark infringement, found the defendant gum manufacturer guilty of unfair competition and affirmed a district court injunction restraining the defendant from selling its product in a package similar to that of the plaintiff.

The Court considered and rejected a suggestion that since the defendant's use of an imitative package showed a deliberate palming-off intention, equity could restrain use of the name, even in the absence of trade-mark infringement as such. The Court declared that the use of an injunction for this purpose could be rationalized only on a theory that equity enjoins to punish for past conduct. And this theory, the Court said, had been rejected by the Supreme Court.

One judge dissented on the ground that the injunction should be enlarged to preclude use of the name selected by the defendant for his product.

(American Chicle Co. v. *Topps Chewing Gum, Inc.* C.A. 2d, March 4, 1954, Frank, J.)

Trials . . . instructions to juries.

■ A New York court has reversed a judgment entered on a verdict in a case where the trial judge, in commenting to the jury after it had been deliberating more than six hours, urged "any individuals or individual who is holding out" to listen to the reasoning of the majority. This, the Appellate Division, First Department, held, was error, since the judge did not also place a duty upon the

majority to give respect to the opinion of the minority.

At least two members of the jury indicated to the judge that they thought the jury was deadlocked. It was then that the judge told the jury that the minority should "listen to the arguments . . . [and] the opinions of the majority and try and come to a conclusion". He observed that he didn't want to be misconstrued about each juror being entitled to his own opinion, and then added: "But at the same time, it is your duty to try and listen to the arguments of those who seem to have the majority viewpoint. See if you can't in good conscience come to that viewpoint."

(Field v. *Field,* N.Y. S.C. App. Div., 1st Dept., March 2, 1954, *per curiam.)*

United States . . . Civil War claims.

■ The United States Court of Claims has held that the so-called Chase Regulations, issued in 1861, are still valid to govern claims of the various Union states against the United States for militia and other expenses incurred in connection with the Civil War, and has accordingly given California a judgment of $8,985.15 in its suit for $7,561,508.15.

The Court had the case under a special jurisdictional act, which California argued was a confession liability by the Congress. The Court refused this construction of the act.

The Chase Regulations were crucial to the decision; California conceded that if they are valid it could not recover, except the minor judgment which was awarded. In 1861 the Congress authorized payments to the states for "enrolling, subsisting, clothing, supplying, arming, equipping, paying and transporting its troops employed in aiding to suppress the present insurrection against the United States. . . ." Pursuant to this act, Salmon P. Chase, the then Secretary of the Treasury, issued regulations which provided that payments would be made for expenses incurred only after the state's troops were mustered into or employed in the service of the United States. Since the California militia was never mustered into federal service, the Court turned down the state's claims, except for $8,985.15 found properly spent by recruiting officers.

Are the Chase Regulations still valid? The Court noted that it had held they were forty-four years ago in *Nevada* v. *U.S.,* 45 C. Cls. 254, and that the case was not taken to the Supreme Court. Nothing has happened, the Court stated, to compel it to rule that they are not still valid. As a matter of historical fact, the Court noted, the claims of the various states have been settled administratively in accordance with the Chase Regulations, except in the case of Nevada. As to that state a direct appropriation to pay the claims was authorized by the Congress in 1929.

(California v. *U.S.,* U.S. Ct. Cls., March 2, 1954, Whitaker, J.)

Wills . . . testamentary restraints.

■ A New York court has ruled that a testator's will that displayed an intention to cut off a beneficiary who married outside the Jewish faith and blood cannot so bar the donee of a power of appointment created by the will without specifically saying so. The Appellate Division, First Department, held that the marriage provision was effective as to the testator's grandson, who was given a power of appointment, but not as to the latter's daughter, who was the donee of the power. For a contrary construction of the will in the Surrogate's Court of New York County, see 39 A.B.A.J., 1099; December, 1953.

The present petitioner sought a construction of the will since she intended to marry a non-Jew. The Court's opinion indicated that it may have been a case of too careful, rather than slipshod, draftsmanship. The Court noted that in one section of the will relating to the marriage proscription the word "appointee" was used, but that in another section, and the one under which it was sought to bar the petitioner, the word was not used. Since, the Court remarked, the will displayed a high degree of technical draftsmanship, it had to be concluded that the testator did not intend his restriction to apply to donees of the power of appointment.

The surrogate had skirted this shoal by ruling that the holder of the power of appointment was a mere conduit through which the property passed and that it actually was a bequest or devise from the testator himself, and that accordingly the restriction would apply. But the Court stated that the construction was applicable to a situation where a court is determining whether the Rule against Perpetuities is violated, and not to the present facts.

(Tanburn v. *Hoffheimer,* N.Y. S.C. App.Div., 1st Dept., February 16, 1954, Botein, J.)

What's Happened Since . . .

■ On March 8, 1954, the Supreme Court:

DENIED CERTIORARI in *U. S.* v. *Douglas,* 207 F. 2d 381 (digested in 39 A.B.A.J. 1095; December, 1953), leaving in effect a decision of the Court of Appeals for the Ninth Circuit that in a federal government condemnation proceeding just compensation for the taking of farm land was not limited to the amount at which the landowner had contracted with the Government not to sell in excess of, but embraced also the possible enhanced value of the land because of irrigation.

■ On March 15, 1954, the Supreme Court:

DENIED CERTIORARI in *Western Reserve Life Ins. Co.* v. *Meadows,* 261 S.W. 2d 554 (digested in 40 A.B.A.J. 151; February, 1954), leaving in effect a decision of the Supreme Court of Texas that the recent military operation in Korea was a "war" within the meaning of that term as used in a double indemnity life insurance policy. This action by the Court apparently means that it will allow each state to decide this question for itself, since the Court has previously denied certiorari [74 S. Ct. 34] in a Pennsylvania case, *Beley* v. *Pennsylvania Life Ins. Co.,* 373 Pa. 231, reaching an opposite result.

DENIED CERTIORARI in *U.S.* v. *Taffs,* 208 F. 2d 329 (digested in 40 A.B.A.J.

52; February, 1954), leaving in effect a decision of the Court of Appeals for the Eighth Circuit that a member of the Jehovah's Witnesses sect properly may be entitled to conscientious-objector status even though he concedes that he believes in "theocratic wars" because they are directed by God.

New Television Show Features Legal Aid

▪ A nationally televised weekly dramatic production which will portray the services performed by lawyers in the protection of the legal rights of individual citizens had its premier over the NBC television network April 8.

The show "Justice!" is sponsored commercially by the Borden Company and originates in New York. It is to be based primarily on actual cases from the files of legal aid organizations, through an arrangement with the National Legal Aid Association. It is to be carried weekly, on Thursday evenings at 8:30-9:00 P.M. (EST) over twenty-eight stations coast-to-coast, with an additional eighteen stations carrying the show on film at later times and dates. (See schedule below.)

Launching of the show follows an extended period of planning and negotiations looking toward a television vehicle which would acquaint the public more fully with the legal aid program, and the increasing part which the legal profession is playing in bringing essential legal services to individuals regardless of their economic status.

Heretofore the Borden Company has sponsored "Treasury Men in Action", which "Justice!" replaces. The new program is another significant step in the growing trend toward the function of lawyers as a source of dramatic material for television. It also represents another important instance of a commercial agency cooperating with the legal profession to make the services of lawyers and of the organized Bar better understood.

Representatives of the National Legal Aid Association, of which Harrison Tweed of New York is president, will serve as consultants in the production of the show.

"JUSTICE!"

Thursdays, 8:30-9:00 P.M. EST, NBC-TV

(Starting April 8, 1954)

LIVE STATIONS

Atlanta, Ga.	WSB-TV	Kansas City, Mo.	WDAF-TV
Baltimore, Md.	WBAL-TV	Minneapolis, Minn.	KSTP-TV
Birmingham, Ala.	WBRC-TV	New York, N.Y.	WNBT
Chicago, Ill.	WNBQ	Philadelphia, Pa.	WPTZ
Cleveland, Ohio	WNBK	Phoenix, Ariz.	KTYL-TV
Columbus, Ohio	WLWC	Pittsburgh, Pa.	WKJF
Davenport, Iowa	WOC-TV	Rochester, N.Y.	WHAM-TV
Dayton, Ohio	WLW-D	San Antonio, Texas	WOAI-TV
*Des Moines, Iowa	WHO-TV	Schenectady, N.Y.	WRGB
Detroit, Mich.	WWJ-TV	Syracuse, N.Y.	WSYR-TV
Elkhart-South Bend, Ind.	WJSV-TV	Toledo, Ohio	WSPD-TV
Ft. Lauderdale, Fla.	WFTL-TV	Tucson, Ariz.	KVOA-TV
Fort Worth, Texas	WBAP-TV	Washington, D.C.	WNBW
Jackson, Miss.	WLBT	Wilmington, Del.	WDEL-TV

DELAYED STATIONS		LOCAL TIME	DELAYED
Abilene, Kansas	KRBC-TV	7:30 PM, Thurs.	14 days
Amarillo, Texas	KGNC-TV	7:30 PM, Thurs.	14 days
Baton Rouge, La.	WAFB-TV	10:00 PM, Sun.	10 days
Boston, Mass.	WBZ-TV	10:30 PM, Sun.	10 days
Grand Rapids, Mich.	WOOD-TV	7:00 PM, Sat.	16 days
Greenville, S.C.	WFBC-TV	8:30 PM, Thurs.	7 days
Houston, Texas	KPRC-TV	10:45 PM, Tues.	19 days
Huntington, Ind.	WSAZ-TV	11:15 PM, Thurs.	14 days
Los Angeles, Calif.	KNBH	8:30 PM, Thurs.	14 days
Louisville, Ky.	WAVE-TV	11:45 PM, Thurs.	7 days
Lubbock, Texas	KCBD-TV	7:30 PM, Thurs.	14 days
**Milwaukee, Wis.	WTMJ-TV	10:00 PM, Thurs.	14 days
New Haven, Conn.	WNHC-TV	5:00 PM, Sat.	16 days
Oklahoma City, Okla.	WKY-TV	10:30 PM, Thurs.	14 days
St. Louis, Mo.	KSD-TV	11:45 PM, Thurs.	7 days
San Francisco, Calif.	KRON-TV	8:30 PM, Thurs.	14 days
Waterloo, Iowa	KWWL-TV	7:30 PM, Thurs.	7 days
Winston-Salem, N.C.	WSJS-TV	8:30 PM, Thurs.	7 days

* As soon as station goes on air.
** Start April 29—until then 10:30 Friday, 15 days delay.

Tax Notes

■ Prepared by Committee on Publications, Section of Taxation, Harry K. Mansfield, Chairman.

Liquidation of Corporation After Purchase of Stock To Acquire Assets

■ The Internal Revenue Code provides in Sections 112 (b) (6) and 113 (a) (15) a precise formula for determining the tax consequences resulting from the complete liquidation of a corporate subsidiary. If the parent has the required 80 per cent of stock ownership and fulfills the other requirements, the liquidation is accorded tax-free treatment under Section 112 (b) (6), resulting in neither gain nor loss to the corporate distributee. Furthermore, under Section 113 (a) (15) the basis of the distributed assets to the parent is the same as it was to the subsidiary. If the tax-free provisions of Section 112 do not apply to a corporate liquidation, Section 115 (c) governs. Under Section 115 (c) gain or loss to the distributee is recognized in an amount representing the difference between the basis of the cancelled stock and the fair market value of the distributed assets. The basis of the distributed assets in the hands of the distributee in such case is the fair market value when the assets were distributed.

In order to preclude the application of Section 112 (b) (6), where it is in terms applicable, some courts have applied a broad principle developed before the enactment of the statutory provision, *viz.*, that if the real intent of the purchaser is to acquire assets rather than stock, the purchase of stock and subsequent liquidation will be treated as a single transaction (purchase of assets).

There are two facets of the single or step-transaction theory as applied to a corporate liquidation—the shareholder-seller's side of the transaction and the purchaser's side.

On the purchaser's side, the single transaction theory has been applied. When it has been found that the purpose in buying stock was to acquire the corporation's assets through liquidation, the courts have held that no gain or loss resulted to the purchaser and that the basis for the assets was the price paid for the stock. *Helvering* v. *Security Savings & Commercial Bank*, 72 F. 2d 874 (4th Cir. 1934); *Comm'r.* v. *Ashland Oil & Refining Co.*, 99 F. 2d 588 (6th Cir. 1938); *Koppers Coal Co.*, 6 T.C. 1209 (1946); *Ruth M. Cullen*, 14 T.C. 368 (1950); *H. B. Snively*, 19 T.C. 850 (1953). None of these cases involved the application of Section 112 (b) (6). These cases regard the transaction as basically a purchase of assets by the purchaser and hence no legal significance is attached to the stock purchase and subsequent liquidation. Of course, if the buyer of the stock immediately liquidates the corporation, perhaps the best test of the value of the assets so received is the price paid for the stock. If this be so, then it makes no difference in a taxable liquidation under Section 115 (c) whether the transaction is fragmentized into steps or telescoped into a single transaction.

In the case of a corporate purchaser, Section 112 (b) (6) and the corollary basis provision of Section 113 (a) (15) are applicable in terms to certain purchases and liquidations occurring since the Revenue Act of 1935. The first case involving the application of this section to such transactions was *Kimbell-Diamond Milling Co.* v. *Comm'r*, 187 F. 2d 718 (5th Cir. 1951). There, the court upheld the Commissioner's contention that the taxpayer, in purchasing all of the stock of another corporation and liquidating it five days later, did not come within these statutory provisions, since in substance the assets rather than the stock of the other corporation had been purchased. Thus, a liquidation had not occurred and the basis of the assets was determined as though they had been bought directly by the purchaser.

In the more recent case of *Distributors Finance Corp.*, 20 T.C. No. 111 (1953), (on petition for review to 9th Cir.), the opposite result was reached. The Commissioner had also argued in this case that the liquidation was part of the original plan. Whether the transactions constituted a single integrated transaction was presented as a question of fact to the court. It was held that on the facts the stock acquisition and subsequent liquidation were separate steps and, therefore, that the requirements of Section 112 (b) (6) had been clearly met. Judge Raum indicated particular concern about the potential tax-saving device lurking in Section 112 (b) (6), particularly in the case of cash liquidations.

On the seller's side of the transaction, it has been held that the only transaction that has occurred is the sale of stock. Since the purchaser undeniably ends up with assets and may be deemed, for tax purposes, merely to have purchased assets, it is not surprising that the Commissioner has taken the position that the corporation has sold assets and that a corporate tax on the gain from such a sale should be imposed. This position has been rejected. *Dallas Downtown Development Company*, 12 T.C. 114 (1949).

Accordingly, it follows that the purchaser may buy assets in the same transaction in which the seller has sold stock. This is illustrated by comparing *Dallas Downtown Develop-*

ment Company, supra, with *Texas Bank & Trust Company of Dallas,* 12 T.C.M. 588 (1953)—(on appeal to 5th Cir.). Despite its holding that the sellers had sold stock in the first case, the Tax Court in the later case (involving the identical transaction) held that the purchasers had bought assets. Section 112 (b) (6) was held to be inapplicable and the basis of the assets to the purchaser was held to be the cost of the stock rather than the basis of the assets in the hands of the liquidated subsidiary.

Thus, the form of the transaction is accepted on the seller's side, but not on the purchaser's side. This difference may be justified because the seller intends to sell stock and the purchaser intends to buy assets.

The arguments made unsuccessfully by taxpayers and the Commissioner in recent cases demonstrate the confusion of thinking that has been generated by the "step-transaction acquisition of assets" theory. This confused thinking is evident in the *Distributors Finance Corp.* case, *supra,* not only in the Commissioner's argument but in the Tax Court's observations by way of dictum. Nevertheless, the courts have steered a consistent course in their holdings with respect to the relatively narrow aspect of the form and substance doctrine herein discussed. The rules derivable from the actual holdings on given assumptions of fact, as distinguished from the analysis in the opinions, cannot be said to be confused. The factual question as to the buyer's purpose is, of course, an obvious source of contention and litigation.

The proposed "Internal Revenue Code of 1954" would appear to end some of the problems. A purchaser of stock could take over upon liquidation assets having a fair market value equal to or exceeding the price paid for the stock, but a lower basis without recognition of gain or loss. The basis for the distributed assets would be the basis for the stock. Gains to corporate shareholders would be considered as dividends eligible for the dividends received credit; in the case of the liquidation of subsidiaries, the dividends received credit for such distributions would be raised to 100% in order to preserve their present tax-free character.

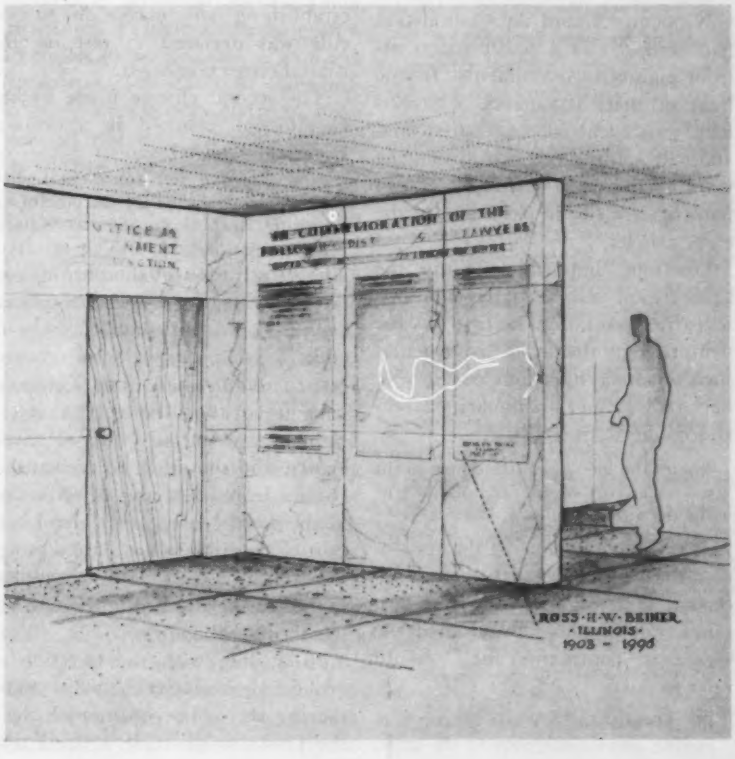
The *Court Holding Company* problem would be alleviated by permitting a corporation to sell its assets and to distribute the proceeds to its shareholders without any corporate gains tax. An incentive for stockholders to sell stock would still appear to be present, however, since proceeds from the sale of "inventory assets" would be taxed at ordinary rates.

In any event, since these proposed changes would not be retroactive to prior years, the present law will undoubtedly have practical interest to taxpayers for a considerable period in the future.

Contributed by Committee Member
Houstin Shockey

Bar Center Panels To Honor Lawyers

■ One of the features of the lobby of the new American Bar Center will be the $1000 memorial inscriptions on marble panels, honoring deceased lawyers prominent at the Bar of their states. One such panel is shown in the architect's drawing at the right.



THE DEVELOPMENT OF INTERNATIONAL LAW

Richard Young • Editor-in-Charge

Developments Abroad Regarding the Continental Shelf

■ Lawyers who have followed the so-called "tidelands" controversy in the United States, which resulted in the passage last year by Congress of the Submerged Lands Act[1] and the Outer Continental Shelf Lands Act,[2] may find of interest two later developments abroad regarding the continental shelf doctrine and claims to submarine areas. The first is the revised draft articles on the continental shelf prepared at the 1953 session of the United Nations International Law Commission. The second is the continental shelf claim put forward by Australia in the fall of 1953.

At its meeting last summer in Geneva the International Law Commission devoted considerable time to reworking the draft articles which it had framed provisionally at its 1951 session. These had been circulated to U.N. members, and the Commission had before it as a result comments from eighteen governments. In the light of these comments, a revised text was eventually prepared and adopted with only two dissenting votes against it as a whole and two more against two in particular of the eight articles.[3]

On four important points the Commission substantially modified its earlier position. The first was the definition of the term "continental shelf", which had previously been declared to mean submarine areas contiguous to the coast

> where the depth of the superjacent waters admits of the exploitation of the sea-bed and subsoil.

In 1953, having come to the conclusion that the earlier text was too uncertain and might give rise to disputes, the Commission adopted the view that "continental shelf" should refer to

> the sea-bed and subsoil of the submarine areas contiguous to the coast, but outside the area of the territorial sea, to a depth of two hundred metres.

This depth, or alternatively the 100-fathom line to which it approximates, is commonly considered to represent the average edge of the geographical continental shelf throughout the world; but the Commission made it clear that its rule did not require the existence of a geographical shelf so long as the submarine areas lay within the prescribed depth limit. It was also said that the areas should be in general strictly contiguous to the coast, but the Commission admitted the possibility of including under the shelf regime shallow areas cut off from the neighboring coast by a narrow strip of deeper waters (as happens in the case of Norway and the North Sea shelf). The burden, however, of establishing any exception to the rule was declared to rest on the coastal state claiming it.

The second change made by the Commission resulted in a declaration that a coastal state

> exercises over the continental shelf sovereign rights for the purpose of exploring and exploiting its natural resources.

The substitution of the phrase "sovereign rights" for the earlier phrase "control and jurisdiction" was in effect a compromise. Some governments, notably the United Kingdom, had urged that the coastal state's right was essentially one of sovereignty, and should be so recognized. Others feared lest the introduction of the word "sovereignty" lend support to assertions of unlimited power over offshore areas. The present formula was the result, though one not wholly unambiguous.

In dealing with the question of offshore boundaries between states sharing the same continental shelf, the Commission made a third revision which showed a considerable advance in its familiarity with the problem. In 1951 it had proposed merely that such boundaries be settled by mutual agreement or, failing agreement, by arbitration. In 1953, in response to requests for more precise guidance on the question, it introduced the concept of geometrical equidistance as the principle which ought to govern in the absence of special agreement or special circumstances. In the case of states with opposite coasts, the boundary would ordinarily be a median line equidistant at every point from the base lines used by each country in measuring its territorial sea. In the case of adjacent states on the same coast, the boundary would be a line running seaward at such an angle as to be equidistant from the respective base lines of the two states. While by no means a universal answer, the principle properly applied may often indicate a suitable solution.[4]

In a fourth change of view, the Commission enlarged the scope of the term "natural resources" to include sedentary fisheries, which in 1951 had been dealt with in the separate articles relating to high seas fisheries. The alteration was due, the Commission explained, to its belief that sedentary fisheries

> in particular to the extent that they were natural resources permanently attached to the bed of the sea, should not be outside the scope of the regime

proposed for the continental shelf. Warning was given, however, that a coastal state must respect under established rules of international law any acquired rights of other states in such fisheries. The extension of the shelf doctrine to sedentary fisheries is perhaps one of the most debatable of the Commission's deci-

1. 67 Stat. 29.
2. 67 Stat. 462.
3. Report of the International Law Commission . . . Fifth Session, General Assembly, Official Records, Eighth Session, Supp. No. 9 (A/2456), pages 12-17.
4. The principle here suggested may have relevance to problems arising under the Outer Continental Shelf Lands Act. Under that Act, the President is empowered to fix the limits of the area on the outer shelf to which each coastal state is to be considered adjacent for the purpose of applying its civil and criminal laws.

sions, in view of the fact that high seas fisheries generally are the subject of an accumulated body of law and custom which puts them in a category of their own.

The Commission maintained unchanged its views that the continental shelf regime should not affect the status as high seas of the superjacent waters or the status of the air space above. It thus rejected the more extravagant claims, found particularly in the actions of several Latin-American states, to jurisdiction over waters and air space above the shelf. It further declared that exploration and exploitation of the natural resources should not result in any unjustifiable interference with navigation and fishing. While installations might be erected on the shelf subject to proper safeguards, none should be permitted in narrow channels or in sea lanes essential to international navigation.

In its report to the U.N. General Assembly, the Commission recommended the adoption by resolution of its draft articles. After debate in the Legal Committee, however, the Assembly resolved on December 9, 1953, to postpone dealing with any aspect of the legal regimes applicable to the high seas and territorial waters (including the continental shelf) until all aspects thereof had been studied and reported on by the Commission.

While the Commission's proposals were thus received somewhat lukewarmly by the Assembly, they met with prompt approval from the Government of Australia. Within a month after the Commission adjourned, Australia advanced claims to the continental shelves off its territory that were closely patterned on the revised draft articles. By proclamation of the Governor-General on September 10, 1953, Australia was declared to exercise "sovereign rights over the sea-bed and subsoil" of the shelf "for the purpose of exploring and exploiting the natural resources" thereof; but any intent to affect the status as high seas of the waters above the shelf was expressly disclaimed. A proclamation to the same effect was issued on the same day with respect to the U.N. Trust Territory of New Guinea, of which Australia is the administering authority.[5]

The shelf area around Australia is very large, expanses extending seaward more than 200 miles being not uncommon. Off its northern coast, the shelf beneath the Arafura Sea reaches unbroken to the Aru Islands, part of Indonesia, and to Dutch New Guinea. Thus far the mineral resources of the shelf have not been shown to be important, although the recent discovery of oil on the coast of Western Australia may stimulate interest in offshore possibilities. Much more significant at present are the pearl shell fisheries off the northern and northwestern coasts, the source of mother-of-pearl. Australia has long sought to control these fisheries, even beyond territorial waters; and one may infer that the shelf doctrine, as extended by the International Law Commission to include sedentary fisheries, seemed ideal for this purpose in Australian eyes.

To deal with the pearl fishery problem in particular, Australia supplemented its general claim by new amendments to its existing pearling legislation. The effect of these was to establish statutory claim to regulate all pearling activities on the continental shelf of Australia and its territories, whether carried on by Australian or by foreign ships and nationals. The shelf was defined, for the purposes of the act, as the area contiguous to the coast, but beyond territorial waters, covered by not more than 100 fathoms of water. It was further provided (taking advantage of the possible exception noted by the Commission) that shallow areas cut off from the neighboring coast by deeper but narrow waters might be assimilated to the shelf proper at the discretion of the Governor-General. The Governor-General was also authorized to establish limits of Australian jurisdiction on shelves shared with other countries.

Pursuant to this statutory authority, the Governor-General on September 25, 1953, issued a proclamation applying the provisions of the pearling act to all Australian waters above a continental shelf lying north of 27° south latitude, except for a small area off the north coast. A second proclamation laid down boundaries on the shelf with Indonesia and Dutch New Guinea, based for the most part on the principle of equidistance proposed by the Commission.[6] The lines thus established were apparently fixed wholly unilaterally.

The country chiefly affected by the Australian claims was probably Japan, whose nationals before World War II had been very active in the pearl fishery. For the first time since the war, Japan in 1953 sent some pearling vessels back to the Arafura Sea, consenting at the same time to discuss with Australia an agreement on conservation and regulation. Although both sides declared their willingness to reach such an agreement, for which proposals were submitted by the Japanese, the negotiations were broken off without result in August, 1953. Their unsuccess undoubtedly precipitated Australia's decision to take unilateral action.

The decision, however, was hardly agreeable to the Japanese, who informed the Australians that, in the view of the Japanese Government, any effort to apply the Australian pearling laws to foreign vessels on the high seas would violate established principles of international law with respect to high seas fisheries. Japan suggested, and Australia agreed in principle, that the question be referred to the World Court at The Hague. Arrangements to this end are said to have been under discussion between the two Governments in recent months.

If the matter is submitted to the Court, the place of the continental shelf doctrine in international law may well be clarified, and the acceptability of the International Law Commission's views considered.

5. *Commonwealth of Australia Gazette*, September 11, 1953, page 2563.

6. The two proclamations are in the *Commonwealth Gazette*, September 25, 1953, pages 2683-2684.

Practicing lawyer's guide to the current LAW MAGAZINES

Arthur John Keeffe • Editor-in-Charge

ANTITRUST: On January 28, 1954, at the House of The Association of the Bar of the City of New York, the New York State Bar Association Antitrust Section held its sixth annual symposium under the chairmanship of Charles Wesley Dunne who deserves great credit for starting these affairs. The proceedings will as usual be printed by Commerce Clearing House, Fifth Avenue, New York, at $2.00 per copy. Attorney General Herbert Brownell, Jr., Chairman Edward F. Howrey of the FTC, Chairman Chauncey Reed of the House Judiciary Committee, Trust-buster Judge Stanley N. Barnes and S. Chesterfield Oppenheim, the Co-Chairmen of the Attorney General's Reform Committee, spoke at the morning session. The Attorney-General remarked that, unlike TNEC, his committee was to consider policy matters. Mr. Howrey talked of the need for the FTC. Mr. Reed stated that his committee was shortly to consider H.R. 497 and H.R. 467, making treble damages discretionary under the Clayton Act and establishing a uniform treble-damage limitation period applying prospectively only with a limit of five years or one year after final decree in a government suit, whichever period would be shorter. No action on basing points appears probable. Judge Barnes stated that since January 20, 1953, the Department began twenty-five suits, fourteen of them criminal. Before suing civilly in ten cases, he showed the complaint informally to counsel for defendants, but the results have been discouraging. It seems lawyers prefer to go to court. Only five of 139 old cases have been dismissed and out of forty-two completed cases, twenty-seven ended in consent decrees or *nolo* pleas. Professor Oppenheim stated his committee of sixty is divided into five area committees, Legal and Economic Concepts, Distribution, Foreign Patents, and Administrative and Enforcement. Area reports are due in March and by May the Co-Chairmen will file an interim preliminary report and by fall, a final report. Jerrold G. Van Cise presided in Mr. Dunne's place in the afternoon. The session was devoted to the Robinson-Patman Act and fair trade. Because of the death of two scheduled speakers, Parker McCollester and Neil Head, Mathias F. Correa and Cyrus Austin spoke with Abe Fortas on the Robinson-Patman Act problems and Thomas Kiernan on fair trade.

Acknowledging the assistance of Justice Felix Frankfurter, Dean Edward H. Levi, Daniel Levin, Graham Aldis, David W. Dangler, John D. Hastings, Stuart S. Palmer and Samuel L. Rosenberry, G. E. and Rosemary D. Hale publish in the December issue of the *Pennsylvania Law Review* (Vol. 102—No. 2; pages 157-184; price for a single copy: $1.25, 3400 Chestnut St., Philadelphia 4, Pa.) a paper entitled "Market Imperfections: Enforcement of the Antitrust Laws in a Friction-Afflicted Economy", and originally read at the antitrust seminar of University of Chicago Law School in June, 1953. In an interesting way, the authors discuss the various factors that make American competition imperfect. It is a good jurisprudential job.

Whether "bigness" is a *per se* violation is a familiar topic. Horace H. Robins studies the cases and concludes that neither "bigness" nor "price leadership" are unlawful. (Vol. 39—No. 7, *Virginia Law Review*, pages 907-948, November, 1953, Charlottesville, Va., $1.25).

His legal conclusions are in sharp contrast with the economic conclusions of Alfred E. Kahn and Joel B. Dirlam ("Integration and Dissolution of the A. and P. Company" Vol. 29—No. 1, pages 1-27, price for a single copy: $1.50; No. 1, *Indiana Law Review* 1-27, $1.50, Bloomington, Indiana) who say: "Dissolution was probably the best thing that could have happened to the Standard Oil Company in 1911, and U. S. Steel would probably have been far better off had it not escaped that fate in 1920". Page 27.

A Harvard law professor should return the compliment to the *Pennsylvania Law Review* for the fine article published by Professor Louis B. Schwartz, of the Pennsylvania law faculty in the January, 1954, issue of the *Harvard Law Review* ("Legal Restriction of Competition in the Regulated Industries: An Abdication of Judicial Responsibility," Vol. 67—No. 3, pages 436-475, $1.50, Gannett House, Cambridge, Mass. Like Mr. Dooley, Professor Schwartz has a contempt for experts and would like judicial review of administrative rulings. His piece is the more timely in that in January the Attorney General began suit against Pan-American and Grace to divest each of the Panagra airline. Is it wrong for a shipline to run an airline? A railroad, a bus line, a copper company, an aluminum plant? Titanium is said to be more heat resistant for jets than aluminum. Why should not Alcoa keep its jet business and make titanium? The Schwartz piece comes when the Department appears to disagree with CAB as to Panagra, just as recently it did with SEC as to the Investment Bankers and FTC as to basing points. If it be any comfort to the defendants, there will be a better judicial review in the Panagra suit in the

courts than from a proceeding before CAB, judging by Professor Schwartz' study.

CLAYTON ACT: To American business the definitive interpretation of the newly amended Section 7 of the Clayton Act is about as important as anything. The *Yale Law Journal* issue has an excellent note on *Hamilton Watch Co.* v. *Benrus Watch Co.*, 114 F. Supp. 307 [Conn. D. C.], affirmed 206 F. 2d 738 (Second Circuit, 1953), which construes the new section for the first time. Apparently Benrus imports its watch movements from Switzerland and anticipating a tariff, it set out to buy control of Hamilton, a domestic plant. Even though its purchases of Hamilton stock were partially for investment, Judge Hincks held that even a minority Benrus representation on Hamilton's board of directors would violate Section 7 and he granted a preliminary injunction against Benrus' voting the Hamilton stock. The note is very well done, indeed. Richard Roe, the anonymous Yale note writer, refers in a footnote (14) to the F.T.C.'s recent action against Pillsbury for its purchase of Ballard's back to the examiner. (Address: Yale Law Journal, 401 A Yale Station, New Haven, Conn.; price for a single issue: $2.00)

FAIR TRADE: Professor Carl H. Fulda of Rutgers Law School has published in the Winter, 1954, issue of the *University of Chicago Law Review* (Vol. 21—No. 2; pages 175-211; single copy $1.75, 5750 Ellis Ave., Chicago 37, Illinois) what he calls "an enlarged version" of the paper he delivered at the Seminar on Antitrust Law at the University of Chicago Law School in June, 1953. I thought I had read all there was to read on fair trade. I was wrong. As usual Carl Fulda has done it again. His discussion is by far the best ever written, and the practicing lawyer who wants to become up to date on fair trade must have it. The failure of the Supreme Court to grant certiorari in *Eli Lilly & Co.* v. *Schwegmann Bros.*, 109 F. Supp. 269 (E.D.La. 1953), affirmed 205 F. 2d 788 (5th Circuit, 1953) certiorari denied 74 S. Ct. 71 (1953), leaves the business world wondering if the McGuire Act applies only intrastate and not interstate as declared by the Third Circuit in *Sunbeam Corp.* v. *Wentling*, 185 F. 2d 903. Granted you fair-trade your product, do you lose your protection if you do not police your retailers to maintain the fair-traded price? This question Fulda discusses in the light of Macy's dispute with G. E. and the New York discount houses. I cannot recommend his piece too highly. For up-to-date developments the speech of Thomas Kiernan at the New York State Bar Association's 1954 symposium published by C.C.H. should be read with Fulda. Kiernan tells how to advise a client and blocks out these points: New York and other State fair-trade statutes refer to "stipulated" prices, whereas the McGuire Act, unlike Miller-Tydings, refers to both stipulated and minimum prices. Arguments are being made that national contracts referring to "minimum" prices are invalid in New York and other stipulated price states; argument was made in the Schwegmann petition for certiorari that, since until the McGuire Act, states were not delegated commerce power for state fair trade laws to affect interstate commerce, they must be re-enacted. Under *Sunbeam* v. *Wentling*, argument is being made that mail order houses can locate in Vermont, Missouri, Texas or the District of Columbia, non-fair-trade territory and ship into fair trade states; and the Federal Trade Commission is being asked under the McGuire Act to prevent manufacturers from fair-trading their products in the event that directly or indirectly they sell at retail. The reason why the McGuire Act came as an amendment to the F.T.C. Act, instead of the Sherman Act—as in the case of Miller-Tydings—was because amendments to the F.T.C. Act go to the House Interstate Commerce Committee instead of to the Judiciary Committee. In the course of his remarks at the New York State Bar Association's 1954 meeting, Professor Oppenheim casually stated that his legal area subcommittee is studying future fair trade policy, and Mr. Kiernan did not seem to leap for joy about this.

ROBINSON-PATMAN ACT: The *Minnesota Law Review* "Robinson-Patman Act—Anti-Trust or Anti-Consumer" (Vol. 37—No. 4; pages 227-245, Minneapolis, Minn., $1.75), has about the best piece I have seen summarizing "in English" the Robinson-Patman law section by section. Most things written about Robinson-Patman are in graphs and economic jargon. This is a straightforward story of the provisions of the Act. We are indebted to the authors, Davis W. Morton, Jr., and Albert H. Cotton. In the current issue of the *Stanford Law Review* (Vol. 6—No. 1; pages 3-22; single copy $1.25, Stanford, California), there is a piece by M. A. Adelman called "The Consistency of the Robinson-Patman Act". I have read the words in it and I am sure it is good, but economists talk so differently or I am so dumb. I am sure Mr. Adelman would say the latter. The point Adelman makes, I think I get. It is that Robinson-Patman is discriminatory in that it makes no allowance to the large buyer for the obvious saving to the seller. In this the Act in all its provisions is consistently discriminatory. The decision by the Supreme Court in *Automatic Canteen* v. *F.T.C.*, 346 U. S. 61, has been very ably noted in the December, 1953, issue of the *Yale Law Journal* (Vol. 63—No. 2; pages 260-265, single copy $2.00, 401 A Yale Station, New Haven, Connecticut). The *Automatic Canteen* case is the first case to reach the Supreme Court where a quantity discount to a buyer was called into question. Apparently, more people feed at these automatic canteens than one might think. The question was whether the F.T.C. made a case by

proving that Automatic Canteen knew it was buying below list. The Court held not and said the burden of proof was on the Commission to "present some evidence indicating that the price was unjustified and also that the buyer knew of this unjustifiability". Not only does the F.T.C. have the subpoena power to obtain the necessary proof but the cost is beyond the means of most buyers. The anonymous Yale note writer, George Spelvin, tells us that only *Bird and Son* (25 F.T.C. 548) and *Minneapolis-Honeywell Regulator Co.* (44 F.T.C. 351), as sellers, have ever successfully established a cost saving defense because the F.T.C. "has insisted that the cost-justification defense reach almost impossible standards of precision." Spelvin of Yale says, "Approximate cost allocations are unsatisfactory; generally only a full field study will be accepted." Recently, the newest member of F.T.C., John F. Gwynne, has dismissed for the Commission a complaint against our three largest soap manufacturers with respect to advertising allowances. It seems you receive a better allowance if you agree to advertise the soap in a newspaper, less by hand bill, and the staff of the Commission said that since the newspaper costs were higher, the allowance was disproportionate and unlawful. In his speech to the Michigan Antitrust Seminar reported in the American Bar Association's Antitrust Section's collection of the speeches at its Boston meetings, Chairman Edward F. Howery predicted a change in Robinson-Patman interpretation. It has come. If Mr. Dooley were still with us, Rush H. Limbaugh, of Cape Girardeau, Missouri, (see 18 *Missouri Law Review* 215, at page 230, footnote 75) would doubtless hear him say: "No matther whether th' Constitution follows th' flag or th' Supreme Coort follows th' ilictic n returns, sure now Th' Fiddyal Trad Coommisyon follows the Pressadent."

The Langer Bills

(Continued from page 385)

changes are not necessary or even desirable, but certainly if the complaints which Senator Langer has received are justified, the cause for complaints should be promptly and efficiently investigated and the failure in administration rectified without the revolutionary changes suggested by the Langer Bills.

With reference to the threat that if these bills are rejected, bankruptcy administration may be returned to the states, we may well wonder how that will cure abuses. Is it the general experience that the administration of receivers in state courts has been more efficient, more satisfactory and less expensive than the conduct of similar receiverships in the federal courts? How the abuses complained of are to be eliminated, or even reduced, by the return of bankruptcy administration to the states is far from clear. Should the Langer Bills pass, it is not difficult to predict the result. Neither creditors nor attorneys will choose to have insolvent estates liquidated in bankruptcy. They will resort to common law assignments. There are many instances where common law assignments are more desirable than bankruptcy, but there are many other instances where in order to unearth fraud or recover preferences, bankruptcy is more desirable.

The development of interstate commerce, the complications of modern industrial life and the present large-scale operations of business enterprises among the various states would seem to make repeal of the Bankruptcy Act inconceivable. The various states would necessarily be compelled to enact state insolvency laws. The conflicts of jurisdiction arising as a result of an attempt to operate under the insolvency laws of different states would lead to confusion, endless litigation and hardships. The development of commerce itself would be seriously handicapped.

Human nature being what it is, all defects in the administration of any branch of the law cannot be entirely eliminated under any system of operations. The most that the Government can expect to do is to furnish the best conceivable system, with proper methods for checking the conduct of those charged with administration of the law. The enactment of the Langer Bills will not change human nature, and it would appear that whatever weaknesses may now exist would be magnified under the system contemplated. Administration by official trustees and by official attorneys would tend to be routine. That is the history of bureacracy. Today there is an incentive for trustees to do a good job in the hope that creditor interests will remember them and reward them by further employment. Attorneys for trustees, who today usually represent creditor interests, at the present time generally are interested in accomplishing results for their clients. They too have in mind the hope of future employment. Under the Langer Bills such incentives would be gone.

We may well reflect upon the observations of the sponsor of the Chandler Act of 1938, who upon its passage stated:[4]

> Four decades, almost to the day, have passed since the Fifty-fifth Congress enacted the Bankruptcy Law of 1898. While that measure has been amended frequently, and at least three efforts made to repeal it, its fundamental purposes have stood the test of time and experience. . . .
>
> It must not be assumed that the new law is flawless, or that it represents the full extent to which Congressional power may be exercised on "the subject of bankruptcies". Rather, the Act which goes into effect on September 22, 1938, is a conservative step forward, measured by humane concepts and taken in the interest of the nation at large. . . .

It is in this spirit that the Bankruptcy Law from time to time has been amended in the past, and it may well be hoped that in the future it will be amended in the same spirit.

4. Walter Chandler, Foreword to "The Bankruptcy Law of 1938" by J. I. Weinstein (1938).

BAR ACTIVITIES

Paul B. DeWitt • Editor-in-Charge

■ The Ohio State Bar Association sponsored two law institutes in March. The Junior Bar Committee held a two-day meeting concerned with both the ethical problems and the financial aspects of building a successful practice. Henry S. Drinker, of Philadelphia, former Chairman of the American Bar Association's Committee on Professional Ethics and author of the recent book, *Legal Ethics,* spoke on the subject "Ethics Is Your Business". Charles H. Keating, Jr., of Cincinnati, and Edward S. Noble, of St. Marys, discussed "The Art of Building a Practice" from the standpoint of the lawyer practicing in a large city and the lawyer in a smaller community. At the final session there was a panel discussion on: "How To Hold the Business You Have". Charles A. Kienzle, of Columbus, served as moderator, and William L. Howland, of Portsmouth, and Bryce W. Kendell, of Salem, participated in the panel.

The Allen County Bar Association sponsored the Institute offered by the Ohio Practicing Law Institute Committee of the State Bar Association on "Perennial Problems of Practicing Lawyers". President L. Earl Ludwig of the Allen County Bar Association presided. Frederick A. Smith, of Toledo, discussed "Client and Public Relations", and Alvin N. Haulund, of Toledo, spoke on "The Business of Managing Your Practice". The subject of fees was considered by Louis A. Ginocchio, of Cincinnati. The speakers covered generally the problems faced by a practicing lawyer, such as the lawyer-client relationship, individual practice as opposed to association or partnership, new requirements of the law, law office management, including filing and recording, supplies and equipment, retainer arrangements, fees, and the education of the client to the value of services rendered.

■ The 77th Annual Meeting of the New York State Bar Association was held at New York in January, at which time Hunter L. Delatour, of Brooklyn, was elected President, Robert C. Poskanzer was re-elected Treasurer and Charles J. Tobin, of Albany, was elected Secretary.

Hunter L. DELATOUR

Continental Photo Service

At the annual dinner the President, Franklin R. Brown, acted as toastmaster and introduced Chief Judge Edmund H. Lewis of the New York Court of Appeals. Judge Lewis spoke on the calendar congestion of the court and noted the problems of judicial administration occasioned by such postwar conditions as increased population, increased use of motor vehicles and the increase of personal injury cases. He complimented those judges who have done so much within the present year to alleviate the problem of congestion and delays. In this connection he stated, "The situation which has developed challenges not only the resources and resourcefulness of the Bench and Bar, but of the local municipal communities as well." The annual award, The Gold Medal Award for Distinguished Services in the Law, was presented by President Brown to Associate Justice Robert H. Jackson of the United States Supreme Court. Justice Jackson, after accepting the medal, spoke on the subject of "Liberty Under Law".

■ A new radio legal series called "Case Dismissed", a public service project of The Chicago Bar Association and the National Broadcasting Company, was recently begun over local Chicago stations. The series started in January with a program concerning automobile accidents and personal injury actions and is to continue for thirteen weeks. Subsequent programs concern buying a home, wills, domestic relations, installment buying, immigration and naturalization, adoption, landlord and tenant, rights when arrested, minors and contracts, divorce, starting a small business and juvenile delinquency. Although the program has been in operation only for a short time, the response from the listening public has been excellent.

■ The Florida Bar Association recently presented a two-day legal institute on the subject of legal ethics, which is probably without precedent in the history of the organized Bar. It is believed to be the first full-scale legal institute held in this country on this subject. Henry S. Drinker, of Philadelphia, discussed "The Ethical Lawyer". A panel consisting of Mr. Drinker, John M. Allison, William A. McRae, Jr., and Giles J. Patterson considered the ethical aspects of advertising by lawyers and also the determination of professional fees from the ethical standpoint. George E. Sokolsky, journalist and author, spoke on "The Ethics of Lawyers from the Layman's Viewpoint", and a panel, moderated by Justice Harold L. Sebring of the Supreme Court of Florida, discussed the public's impression of lawyers' ethics. "The Problem of Discipline" was discussed by Shelden D. Elliott, President of the Association of American Law Schools, and there was a panel discussion of disciplinary procedures. Darrey A. Davis, of Miami Beach, President-Elect of the Florida Bar, was moderator. Charles E. Clark, Judge of the United States

Court of Appeals for the Second Circuit, spoke on "The Lawyer's Duties to the Courts". The final address of the institute was given by Owen J. Roberts, former Justice of the Supreme Court of the United States, on the subject of "The Lawyer's Duties to His Clients".

■ The Bar Association of St. Louis presented a Lawyers' Day devoted to a conference on trial tactics. The purpose of the conference was to present useful, up-to-date material on trial procedures. Problems of the general practitioner were considered and also the problems of those handling claims for and against insurance companies, common carriers and other types of litigation. The evening was devoted to the Annual Dinner at which William J. Jameson, President of the American Bar Association, spoke and John J. Parker, Chief Judge of the United States Court of Appeals for the Fourth Circuit, was a special guest.

■ A joint meeting of Junior Bar State Chairmen and other bar representatives from the First and Second Circuits was held in Boston in January to stimulate interest in Junior Bar work in the New England area and to exchange ideas on this subject. Lawyers from Maine, Massachusetts, Rhode Island, Connecticut, New Hampshire and Vermont were present. William R. Moller, Chairman of the Connecticut Junior Bar, reported on the activities of the Junior Bar of Connecticut. A Lawyers' Speaker's Bureau was organized, the adoption of Federal Rules of Civil Procedure in the Connecticut state courts was advocated, a television show and institutes on continuing legal education were sponsored.

■ A survey was conducted by the Toledo Bar Association on the question of social security for lawyers. Because the question of inclusion of lawyers in the national system was before the Congress, the Toledo Bar was circulated to see if there was a change in the grass-roots sentiment which originally opposed inclusion of lawyers. Answers were received from 311 members. The following table presents the tabulated returns:

	No.	%
Favor compulsory inclusion of lawyers	53	17
Favor optional inclusion of lawyers	180	58
Favor either of above	38	12
Oppose inclusion of lawyers	40	13

■ The International Bar Association announced today that the Fifth International Conference of the Legal Profession conducted under its auspices will be held in Monte Carlo, Monaco, from July 19 to 24, 1954.

One of the seven topics on the agenda is a report on the "Constitutional Structure of the United Nations, in the Light of the Proposed Amendatory Conference of 1955". The Secretary-General on-leave, Amos J. Peaslee, before his appointment as American Ambassador to Australia, headed the Association's Committee on this topic, which includes outstanding members of the judiciary and the legal profession from many nations of the world. In addition, the following topics will be discussed: code of ethics for lawyers; economic warfare (particularly the aspect relating to the restitution of private property which has been vested or blocked); experience with treaties to avoid double taxation; extraterritorial effects of divorces and separations; international aspects of nationalization; and taking evidence abroad by way of documents or testimony.

The following committees will meet at the Conference: Human Rights, International Economic Cooperation, International Judicial Cooperation and Legal Aid.

The International Bar Association is a federated organization, the member organizations of which are national bar associations from the principal countries of the world outside the Iron Curtain. It was formed in 1947 at the initiation of the American Bar Association which realized the need for an organization which would comprise the organized Bar and individual members of the Bar from all the nations of the world. Individual members of the Association are classified as patrons and are elected by the Executive Council of the Association.

The program and arrangements for the Monte Carlo Conference are in the hands of Edward V. Saher, of New York, Chairman of the Program Committee, and Thomas G. Lund, of England, Treasurer and Chairman of the Conference Committee.

The other principal officers of the Association are George M. Morris of Washington, D. C., Speaker of the House of Deputies; Gerald J. McMahon, Acting Secretary General; and Paul B. DeWitt, Assistant Treasurer, of New York.

Previous conferences of the Association were held in New York in 1947, The Hague in 1948, London in 1950 and Madrid in 1952.

In addition to the work of the Conference, an interesting social and touring program has been arranged. The Mayor of Nice and the Bar Association of Nice will entertain the conferees and their ladies at a garden party at the Villa Massena. Other social functions will be held in Monte Carlo itself, including a banquet at the Summer Sporting Club on the Sea.

Members of the legal profession interested in becoming patrons and in attending the Monte Carlo Conference may obtain further information by writing to the Acting Secretary General of the Association, Gerald J. McMahon, 501 Fifth Avenue, New York, 17, N. Y.

How many of your lawyer friends and associates are not members of the American Bar Association?

Glenn Winters says:

"With the added facilities and resources that will be provided in its new building, the American Bar Association is going to move out into fields of greater accomplishment and wider public influence than ever before in its history. In the past, A.B.A. membership has been a badge of distinction and prestige. It will always be so, but the day is almost upon us when the obverse also will be true—when if a lawyer is not a member of the American Bar Association, his friends and acquaintances will wonder why not."

Please Do the Following:

(1) Enumerate below your nonmember lawyer friends to whom you would like the new American Bar Association brochure sent.

(2) Clip the names and send them to American Bar Association Headquarters.

(3) After two weeks have elapsed, call these men whose names you have submitted and offer to endorse their applications for membership.

(4) Reach over your shoulder and give yourself a hearty pat on the back for having served your friend and your profession.

To American Bar Association Headquarters
1140 North Dearborn Street
Chicago 10, Illinois

I suggest for American Bar Association membership:

Name _____ Address _____

Name _____ Address _____

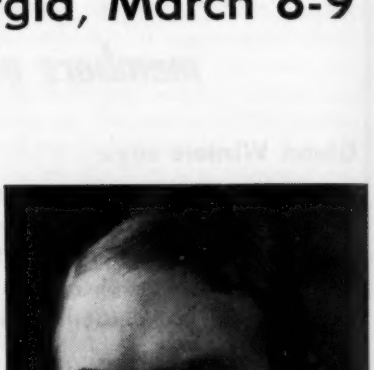
Name _____ Address _____

Proceedings of the House of Delegates:

Midyear Meeting; Atlanta, Georgia, March 8-9

■ In this issue, we present a summary of the proceedings of the House of Delegates at the Midyear Meeting in Atlanta, Georgia, last March. As is our custom, the summary contains the complete text of resolutions adopted by the House (with the exception of a series of resolutions dealing with technical changes in the Internal Revenue Code) and a synopsis of the debate on actions taken.

During its first session, the Delegates heard reports on the construction of the American Bar Center and adopted resolutions reaffirming the Association's stand on increasing judicial and congressional salaries and approving the principle of recognition of regulated specialization in various fields of the law.



DAVID F. MAXWELL
Chairman of the House of Delegates

FIRST SESSION

■ The 1954 Midyear Meeting of the House of Delegates convened in the Great Exhibition Hall of the Atlanta-Biltmore Hotel, Atlanta, Georgia, at 10 A. M., Monday, March 8, 1954. David F. Maxwell, Chairman of the House, presided.

After the roll call, Glenn M. Coulter, of Michigan, Chairman of the Committee on Credentials and Admissions, introduced thirty-four new members of the House.

President William J. Jameson, of Montana, reporting in his dual role of President of the Association and President of the American Bar Foundation, said that the Association needs more money to carry out its programs and that he hoped that the money could be obtained by increasing the size of the Association, rather than by raising the dues.

Allan H. W. Higgins, of Massachusetts, Chairman of the Foundation's Executive Committee, reported that construction of the new Bar Center is on schedule and that the buildings will be completed in time for dedication at the Annual Meeting in Chicago next August.

George Maurice Morris, of the District of Columbia, Chairman of the Foundation's Finance Committee, said that his report was entitled "Money and Men". He reported that the fund-raising campaign has reached 82 per cent of its goal, with total pledges of $1,233,277 of the needed $1,500,000. He read the list of local chairmen in the eleven states that have reached or gone beyond their quotas. According to the report, the average contribution of members of the Association is $57, while the average contribution of lawyers that are not members is $25. Mr. Morris said that the total number of contributors to March 3 was 12,475, of whom 20 per cent are not members.

Robert G. Storey, of Texas, Chairman of the Foundation's Research and Library Committee, said that over fifty subjects of research had already been referred to his Committee and were under consideration. He said that the Center will not be a briefing agency for individual lawyers or law officers, nor an organization to compete with the law schools in the scientific investigation of legal problems. The Center will be a clearing house of information about legal research and the problems of the legal profession, as well as a repository of information about bar association work and research.

Roy E. Willy, of South Dakota, Chairman of the Plans, Specifications and Construction Committee of the Foundation, reported briefly.

Harold H. Bredell, of Indiana, said in his Treasurer's Report, that, for the first seven months of the current fiscal year, the Association's income from all sources was approximately $713,000, an increase of $47,000 over the income for the same period for last year. He pointed out, however, that the Association's expenses for the period were also greater than they were in 1953, although he said that it was hoped that the Association would end the year in the black.

Donald A. Finkbeiner, of Ohio, Chairman of the Budget Committee, said that the total appropriations for the year now stood at $562,848.36.

He emphasized the importance of keeping recurring appropriations as low as possible.

Theodore Voorhees, of Pennsylvania, Chairman of the Committee on Lawyer Referral Service, reported that there are some ninety Lawyer Referral Services in the United States, which last year served some 50,000 people. Although this number of clients is very small in comparison to the potential, Mr. Voorhees said that a recent study of 200 white collar workers in the salary range between $3,500 and $5,000 showed that 63 per cent felt that they could not afford the services of an attorney, obviously believing that it would cost them $50 to $100 to obtain legal advice. He declared that the Lawyer Referral Service is the best means of providing legal service to the 50,000,000 employed citizens who are not receiving it.

Urge Increase in Salaries of Federal Judges and Congress

The Committee on Judicial Selection, Tenure and Compensation, under the Chairmanship of Morris B. Mitchell, of Minnesota, offered the following resolution for adoption by the House:

> RESOLVED, That the American Bar Association approves the salary increases in the Judicial and Legislative branches of the Federal Government, as recommended in the Report of the Commission on Judicial and Congressional Salaries, dated January 15, 1954, and as incorporated in amendments to S. 1663, offered January 18, 1954, by Senator McCarran of Nevada, and in H. R. 7510, introduced by Congressman Chauncey W. Reed, of Illinois.

Bernard G. Segal, of Pennsylvania, Chairman of the Commission, was given unanimous consent to address the House in favor of the resolution. He praised the Association for its efforts to increase judicial and congressional salaries, and summarized the work of the Commission, whose recommendations for the salary increases have the support of President Eisenhower and of a majority of the newspapers of the country. Mr. Segal said that the only question was whether Congress would have the courage to raise salaries since its own pay was involved.

The House then adopted the resolution by a unanimous vote.

JOSEPH D. STECHER
Secretary of the Association

HAROLD H. BREDELL
Treasurer of the Association

Charles W. Joiner, of Michigan, Chairman of the Committee on Specialization and Specialized Legal Education, had three recommendations for the consideration of the House. They were as follows:

> (1) That the American Bar Association approves in principle the necessity to regulate voluntary specialization in the various fields of the practice of the law for the protection of the public and the Bar, and
>
> (2) That the American Bar Association approves the principle that in order to entitle a lawyer to recognition as a specialist in a particular field he should meet certain standards of experience and education, and
>
> (3) That the implementation, organization, and financing of a plan of regulation to carry out such principles is delegated to the Board of Governors, subject to final approval by the House of Delegates.

These recommendations are different from those originally drafted by the Committee. They were offered to the House in the form proposed by the Board of Governors and accepted by Mr. Joiner's group. Mr. Joiner gave two basic reasons for the recommendations: First, uncontrolled specialization might ruin the profession and, secondly, the public interest would be better served by co-operation between the general practitioner and the specialist.

The House voted to adopt the Committee's resolution in the form suggested by the Board of Governors.

Edward H. Jones, of Iowa, Chairman of the Committee on Coordination of Bar Activities, reported on the progress made in the program of co-ordinating the efforts of the American Bar Association with the state and local associations. Among other projects, Mr. Jones spoke of plans for Sections and Committees of the American Bar Association to present short programs at state and local meetings of the Bar; of the fact that an American Bar Association column is now running monthly in a substantial number of state and local bar association publications; and of efforts to assist in the collection of materials for the Research Center.

George Roberts, of New York, Chairman of the Committee on Retirement Benefits, reported on the status of the Jenkins-Keogh Bills which would allow an income tax deduction for amounts set aside by self-employed workers for retirement. He reported that the Committee had been unsuccessful in attempting to get the Jenkins-Keogh principle included in the Omnibus Tax Bill by the Ways and Means Committee of the House of Representatives. Efforts are being made to get the Senate to insert the provision in the Omnibus Tax Bill.

Allen L. Oliver, of Missouri, reporting for the Committee on Unemployment and Social Security, of which he is Chairman, reiterated the Committee's stand opposing any form of Social Security for lawyers. He cited the results of a survey of state and local bar associations made by the Committee to show that there is no overwhelming grassroots sentiment among members of the Bar for inclusion within the Social Security program.

The House recessed at 12:30 P.M.

■ During its second session, the House approved Association co-operation with commercial firms in the production of TV programs dealing with the administration of justice, endorsed the Universal Copyright Convention, and approved a series of proposals designed to aid in the war against organized crime. They also approved the Section of Taxation's proposals for changes in the Internal Revenue Code.

SECOND SESSION

■ Chairman Maxwell called the House to order for its second session at 2:00 P.M., Monday, March 8.

The first item on the calendar for the afternoon was the report of the Committee on Public Relations, given by Chairman Thomas L. Sidlo, of Ohio. This Committee had four recommendations for which they sought House approval. The first of these would have authorized the Committee to prepare for distribution to the entire profession a brochure emphasizing the responsibility of lawyers to strengthen the profession by "exemplary conduct in daily practice" and "supporting and participating in the worthy objectives of the organized Bar".

Secretary Stecher called attention to the expense of such a project and moved that the recommendation be referred to the Budget Committee and the Administration Committee of the Board of Governors. The House voted in favor of the referral after Mr. Sidlo said that he had no objection.

The Committee's second resolution was as follows:

> That the committee be authorized to cooperate with commercial producers of television films with respect to a proposed series of dramatic productions having to do with law and the administration of justice. These agreements would embrace script consultation, the right of review of scripts, casting, dramatic content and commercial sponsorship of these shows, but would entail no financial commitment or expense on the part of the Association. They would include the authority to decide when the name of the Association could be used as "cooperating" in the productions. After a sponsor is obtained, before the contract is carried out by broadcasting or televising, the contract with the sponsor shall be submitted to the Board of Governors for the Board's approval.

This recommendation stirred up some debate on the question of choice of commercial sponsorship of a program bearing the name of the Association. Dean Jefferson B. Fordham, of the University of Pennsylvania, and Judge Floyd E. Thompson, of Illinois, urged that it was unwise to give such blanket authority to any Committee. The resolution was finally adopted with an amendment offered by Richmond C. Coburn, of Missouri, requiring approval by the Board of Governors.

Resolutions 3 and 4 were adopted by the House with little debate. The word "television" was added to No. 3 on motion of William B. Cudlip, of Michigan.

The resolutions were as follows:

> 3. That whenever erroneous, misleading or unjustifiedly critical statements or representations about lawyers, the legal profession or the American Bar Association appear in the press, in magazines or other publications, in films, television or in radio scripts, the Chairman of the Public Relations Committee be authorized to take prompt and appropriate steps to rectify them, in the name of the American Bar Association, with the approval in each instance of the President or Secretary of the Association.

4. That the committee be authorized to select and appoint an Advisory Council consisting of the professional counsel of the state and local associations, to consult and advise with the committee on its program and policies.

Committee on Communism Makes Progress Report

Former Senator Herbert R. O'Conor, of Maryland, Chairman of the Committee on Communist Tactics, Strategy and Objectives, gave an oral report that did not require action. He summarized the Committee's position on pending legislation intended to tighten legal restraints against Communists. He announced that Freedoms Foundation had awarded its George Washington Honor Medal to the Association for the publication of the Committee's *Brief on Communism: Marxism - Leninism* and said that the FBI has supplied copies to its agents throughout the country.

Chairman Maxwell then took notice of the presence in the audience of Chief Justice Campbell C. McLaurin of Alberta, who was presented to the members of the House.

The next business to come before the House was the following resolution which was sponsored jointly by the Section of International and Comparative Law and the Section of Patent, Trade-Mark and Copyright Law:

RESOLVED, That the American Bar Association endorses the ratification by the United States of the Universal Copyright Convention signed at Geneva, Switzerland, on the sixth day of September, 1952, with such implementing legislation to be enacted by the Congress of the United States prior to deposit of the United States instrument of ratification as will be necessary to effectuate the purposes of the Convention, and that the Section of International and Comparative Law and the Section of Patent, Trade-Mark and Copyright Law are authorized to present the position of this Association in this matter before Congress.

John Schulman, of New York, was given unanimous consent to address the House on behalf of the treaty. He explained that it had been prepared by representatives of thirty-nine countries of Western Europe, the British Commonwealth and Latin America, as well as the United States. The Iron Curtain countries did not participate. It took more than five years to draw up the treaty, and all interested groups were consulted as the work proceeded. He emphasized the facts that the treaty is not self-executing and that it does not create new substantive law.

On motion of Andrew H. Schmeltz, of Pennsylvania, the Chairman of the Patent Law Section, the House voted to adopt the resolution.

Mr. Schmeltz then proposed the following, which were adopted without debate:

I.

RESOLVED, That the American Bar Association disapprove S. 27 and H. R. 392, 83d Congress; and that the Section of Patent, Trade-Mark and Copyright Law is authorized to present the position of the Association in these matters before Congress.

II.

RESOLVED, That the American Bar Association approve the following principles:

1. That no trade-mark filed by a person of a member country of the International Convention for the Protection of Industrial Property in another member country shall be refused or invalidated for the sole reason that the same trade-mark has not been previously filed or registered in the country of origin;

2. That abandonment of a trade-mark in a member country of the International Convention for the Protection of Industrial Property where it is registered shall be ground for cancellation of the registration in such country, and non-use of the registered trade-mark for a period of two years in the country where such cancellation action is instituted shall be presumptive evidence of abandonment rebuttable by convincing evidence;

3. That the member countries of the International Convention for the Protection of Industrial Property shall provide for the registration of service trade-marks; and that the Section of Patent, Trade-Mark and Copyright Law is authorized to present the position of the Association to United States delegates to the 1954 biennial meeting in Brussels of the Congress of the International Association for the Protection of Industrial Property.

Alfred J. Schweppe, of Washington, Chairman of the Committee on Peace and Law Through United Nations, gave an oral report in which he summarized the action of the Senate on the Bricker Amendment.

On behalf of Albert MacC. Barnes, the Chairman of the Committee on Customs Law, who was prevented from attending the meeting by illness, Secretary Stecher moved the following resolutions, which were adopted without debate:

Authority is hereby given the Committee on Customs Law, by brief and personal appearance in the name of the American Bar Association, before the Senate Finance Committee or other Committees, to propose and support the following amendments to H. R. 6584:

(A) Section 4. All acts, findings, estimates, determinations and decisions of any customs administrative officer acting under the provisions of this act, or under the provisions of the Customs Simplification Act of 1953, Public Law 243, 83d Congress, shall be subject to complete judicial review by the United States Customs Courts in the manner provided by existing laws and including the Administrative Procedure Act.

(B) Section 4 (a). In any appraisement made under this act the Appraiser shall state on the face of his

report to the Collector the basis or reason for his appraisal.

Thomas E. Taulbee, of Delaware, Chairman of the Membership Committee of the Junior Bar Conference, was given unanimous consent to address the House on the work of that committee. He said that the Conference had designated March as Membership Month, and every member of the Junior Bar had been asked to get one new member. A great deal of publicity was given to this effort, Mr. Taulbee said, both in the *Young Lawyer* and in other publications. The Conference is also setting up an American Bar membership booth at all annual meetings of the state Bars, and is attempting to approach each newly admitted lawyer about Association membership.

Archibald M. Mull, Jr., of California, Chairman of the Committee on Membership, praised the work of the Junior Bar. His brief oral report stressed the importance of increasing the membership of the Association.

The report of the Committee on Individual Rights as Affected by National Security was then given by its Chairman, Whitney North Seymour, of New York. He said that the Committee had found it impossible to complete its study of procedure in congressional investigations for report at this meeting, but that he expected to make a complete report by the time of the Annual Meeting in Chicago.

Dates Set for Next Meetings of House

Secretary Stecher, reporting for the Board of Governors, said that the Board had requested the American Bar Foundation to undertake a study of the Canons of Professional Ethics to determine whether they should be revised. He announced that the next Midyear Meeting would be held in Chicago on February 21 and 22, 1955, and that the 1956 Annual Meeting would be in Dallas, Texas.

Walter P. Armstrong, Jr., Chairman of the Section of Criminal Law, presented the following two resolutions to the House:

I.

Resolved, That the American Bar Association approves and recommends the passage by Congress of the following bills:

(1) *H. R. 6899.* A bill to permit the compelling of testimony notwithstanding a plea of privilege against self-incrimination, under certain conditions, in proceedings before either House of Congress, congressional committees, federal courts and federal grand juries, and to permit the granting of immunity from prosecution in connection therewith.

(2) *H. R. 7118.* A bill to punish as a federal offense the use of interstate commerce in furtherance of conspiracies to commit crimes of the kinds usually associated with organized crime, in violation of state laws.

(3) *H. R. 7311.* A bill to control the transmission of certain types of gambling information in interstate and foreign commerce.

(4) *S. 636.* (*H. R. 7404*). A bill to permit appeals by the Government from pretrial orders suppressing evidence, in criminal prosecutions in the federal courts.

(5) *H. R. 477.* A bill to authorize the acquisition and interception of communications in the interest of national security and defense.

FURTHER RESOLVED, That the Criminal Law Section be, and it hereby is, authorized to advocate on behalf of the American Bar Association by all appropriate means the passage of these bills by Congress.

II.

RESOLVED, That the By-Laws of the Section of Criminal Law be, and that they are hereby, amended by adding thereto, in Article III, Section 2, thereof, following the word "Secretary", the words "and the last retiring Chairman of the Section".

Frank W. Grinnell, of Massachusetts, raised a question about H.R. 6899, which would grant immunity from prosecution in certain cases where a witness pleads self-incrimination, since the immunity would not apply to state prosecution.

Mr. Armstrong replied that his Committee were aware of that problem and that it might prove necessary to take some action to prevent that. He said that there were numerous limited immunity statutes, however, none of which have made the question of immunity from state prosecution a pressing problem.

There was some debate over the Committee's fifth proposal, which approved of H.R. 477 to legalize wire-tapping. Senator Morse, a member of the Section's Council, had filed a strong minority objection to the Section's report, which Mr. Armstrong summarized. Senator Morse's report took the position that the proposed legislation was far too broad and that the proposed "safeguards" would not be effective.

The House finally voted to approve all the Section's recommendations except No. 5, which was referred back to the Section.

Thomas N. Tarleau, of New York, offered the following resolution for the Section of Taxation:

RESOLVED, That the House of Delegates of the American Bar Association authorizes the Section of Taxation to cooperate with the appropriate

committees of the Congress and their Technical Staffs in drafting technical changes in the Internal Revenue Code of 1954.

The Section of Taxation had twelve other recommendations for consideration by the House. These deal with proposed changes in the Internal Revenue Code. Since the text of the resolutions occupied some forty-seven pages of the House calendar, lack of space makes it impossible to publish it here. The gist of the resolutions may be summarized as follows:

1. Changing the final date for filing amended declarations of estimated tax and for filing returns in lieu of such declarations from January 15 to February 15.

2. Mitigating certain penalties which are imposed upon taxpayers for failure to file declarations of estimated tax and for substantial underestimation. This would eliminate the present penalty where a taxpayer estimates his tax and then unexpectedly receives a large amount of additional income. At present, the penalty is on the full amount of the difference between the estimate and the total income. The change would place the penalty on the amount that is finally shown on the return.

3. Providing that a return, statement or other document is filed and payment made when mailed.

4. Giving the Internal Revenue Service discretionary power to waive penalties imposed in connection with excise and miscellaneous taxes. The Service now has such discretion with reference to penalties for income, estate and gift taxes.

5. Extending the marital deduction provisions of the estate tax laws to qualified life estates. At present, a widow who has the income of a trust with a general power of appointment over the corpus is allowed a deduction; there is no deduction, however, if she has a life estate and a general power.

6. This provision was correlative with No. 5 and made the same change in the gift tax.

7. Giving the same treatment to property passing by intestacy as by will, where the decedent has renounced the interest. The act of renunciation does not constitute a "transfer in contemplation of death" if the renunciation is of property passing by will, but the renunciation has been held to be a taxable gift where the property passed by intestacy.

8. Resolution No. 8 was correlative with No. 7, dealing with the gift tax.

9. Changing the definition of "business done" by Western hemisphere trade corporations so as to exclude purchases and incidental non-income-producing activities outside the Western hemisphere.

10. Amending Section 102 so that only the unreasonable accumulations would be subject to penalty; at present the penalty is on all the income of the corporation.

11. This was a recodification of Supplement E of the Code, covering income taxation of estates and trusts. The revision is the culmination of nine years' work by the Section, the Treasury, and the staffs of the congressional committees, and contains thirty-seven different provisions.

Two of these thirty-seven provisions aroused considerable debate. One dealt with the throwback of trust income to the beneficiaries and the other with the treatment of an estate as a single unity.

The House gave unanimous consent to have William E. Murray, of New York, Chairman of the Section Committee that drafted the provisions explain them.

Franklin Riter, of Utah, A. L. Merrill, of Idaho, H. Cecil Kilpatrick, of the District of Columbia, Timothy I. McKnight, of Illinois, James D. Fellers, of Oklahoma, and Allan H. W. Higgins, of Massachusetts, all took part in the debate on the proposal. Opponents of the Section's draft argued that it was too complicated, that it contained features undesirable in many states and that it should be considered by the Section of Real Property, Probate and Trust Law. Proponents declared that it was impossible to get 100 per cent agreement on any draft, that the language could not be made simpler and that it was important to have the views of the Association on record, since the proposed revision will be considered by Congress at this session.

A motion was made to defer action until the August meeting, and this was amended to refer the whole revision to both the Tax Section and the Real Property Section. Both these motions were defeated, and the House finally adopted the Section's draft.

12. The Tax Section's last recommendation was a change in the Section's By-laws increasing the number of Council members to nine and decreasing their term to three years. It was approved without debate.

Edwin M. Otterbourg, of New York, was given unanimous consent to introduce a resolution calling for no change in the present provisions of Circular Letter 23, dealing with practice before the Treasury, which provide that the admission of non-lawyers as agents before the Department does not authorize them to engage in the practice of law.

On motion of Osmer C. Fitts, of

Vermont, the resolution was referred to the Committee on Draft.

William N. Bonner of Texas, speaking for the Section of Mineral Law, said that his Section had prepared a resolution calling upon Congress to dispose of public lands not needed for legitimate government purposes. The Board of Governors had recommended that this be not adopted on the ground that it was not within the objects of the Association. Mr. Bonner said that he was not prepared to discuss the question, and therefore moved that the resolution be referred back to the Section.

James R. Morford, of Delaware, raised a point of order, saying that if the resolution was beyond the purposes of the Association, a motion to recommit it was also out of order.

Chairman Maxwell sustained the point of order; Mr. Bonner appealed from the ruling of the Chair, and the ruling was sustained by a vote of 84 to 44.

The House recessed at 5:20 P.M.

■ At this session, the House of Delegates voted to grant provisional approval to two law schools and urged Congress to withhold appropriations for nonaccredited law schools enrolling veterans under the GI Bill of Rights. It also deferred action on a proposal to amend the United States Constitution to prevent any assertion of presidential authority to seize private property other than in a manner prescribed by the Congress.

THIRD SESSION

■ When the House reconvened at 10:30 A.M. on Tuesday, March 9, Roy A. Bronson, of California, reporting for the Committee on Traffic Court Program in the absence of Chairman Albert B. Houghton, of Wisconsin, told of the regional traffic court conferences organized by the Committee, saying that eight such conferences had been held since the Boston meeting, and that there would be nine more before the Chicago meeting. Mr. Bronson also spoke of the traffic court contests conducted by the Committee, estimating that some 850 cities would participate in this year's contests.

C. Baxter Jones, Jr., of Georgia, Chairman of the Junior Bar Conference, made an oral report on the activities of the Conference. His report covered the three major projects that the Conference is stressing this year: The *Junior Bar Handbook*, distributed to the 600 people who make up the "official family" of the Conference, which explains the structure and functions of the Junior Bar Conference; the Conference's *Newsletter*, which goes out to about 300 officers and committee members as well as to state and local junior bar groups; and the Conference's membership campaign.

Mr. Jones read the following resolution, which had the approval of the Board of Governors:

> RESOLVED, that each member of the House of Delegates is requested and strongly urged immediately upon returning from this meeting to his home state, to prepare a list of at least ten nonmembers of the Association whose application for membership he would be willing to endorse, and to transmit that list at once to the young lawyer whose name appears on Exhibit A attached hereto as the Junior Bar Conference state chairman for that state, with a request that said young lawyer attempt to get those prospects to join the Association during "Membership Month", which is hereby declared to be March of 1954.

The resolution was adopted.

Whitney North Seymour, of New York, reporting for the Section of Legal Education and Admissions to the Bar, offered the following resolutions:

I.

> WHEREAS, The School of Law of Villanova University of Villanova, Pennsylvania, the School of Law of Salmon P. Chase College of Cincinnati, Ohio, and the New York Law School of New York, New York, have applied for the approval of the American Bar Association and invited inspections; and
>
> WHEREAS, Inspections show that the schools are in full compliance with the standards of the American Bar Association for Legal Education;
>
> NOW, THEREFORE, BE IT RESOLVED, That the American Bar Association grants provisional approval to the School of Law of Villanova University, the School of Law of Salmon P. Chase College, and the New York Law School, each school to be subject to an annual inspection until full approval be given.

II.

> WHEREAS, It is desirable that all appropriations made by Congress for legal education for veterans should assure those veterans the best legal education possible, and
>
> WHEREAS, Legal education for veterans should be given only in those law schools which have been approved by the American Bar Association;
>
> NOW, THEREFORE, BE IT RESOLVED, That the House of Delegates expresses its opposition to Senate Bill 2254 pending in the Senate of the United States, which would permit the expenditure of public funds for law study in schools not approved by the American Bar Association.

Both resolutions were adopted without debate.

The House then turned its attention to the report of the Committee on Jurisprudence and Law Reform, given by Albert E. Jenner, Jr., of Illinois, the Committee's Chairman. He proposed a resolution which would have placed the Association on record as favoring Senate Joint Res. No. 3, introduced by Senator McCarran, which proposes the following amendment to the United States Constitution:

> The Executive power of the United States shall not be construed to extend at any time to any taking of private property other than in a manner prescribed by Act of Congress.

Mr. Jenner explained that the purpose of this amendment was to make certain that the Executive Department was without constitutional power to seize private property other than in a manner prescribed by the Congress. It was prompted by the seizure of the steel mills by President Truman.

This proposal aroused one of the longest debates at this meeting of the House. The House first voted down a proposal to defer action until the August meeting by the close vote of 77 to 73, and then, after further debate on the original motion, upon

reconsideration, reversed itself and postponed action. John C. Satterfield, of Mississippi, a member of the Committee, Charles M. Lyman, of Connecticut, Frank W. Grinnell, of Massachusetts, Franklin Riter, of Utah, William A. Sutherland, of Georgia, Hatton W. Sumners, of Texas, Julius Applebaum, of New York, Dean Jefferson B. Fordham, of Pennsylvania, Ben W. Miller, of Louisiana, and Edward A. Dodd, of Kentucky, all participated in the debate. The opponents argued that amending the Constitution was a serious matter that required careful study and deliberation, and that no hasty action should be taken. It was urged that the language of the proposed amendment was inept. Perhaps the argument that caused the House to change its mind was that the amendment had received very little consideration by the congressional committee, only one witness appearing during the hearings, that witness being Senator McCarran.

Mr. Jenner then proposed the following resolution offered by the Committee on Jurisprudence and Law Reform:

> RESOLVED, That Resolution No. 11, being a proposal for amendment of Article V of the Constitution of the United States, submitted to the House of Delegates at its 1953 Annual Meeting and by it referred to the Standing Committee on Jurisprudence and Law Reform for study and report at the 1954 Midwinter Meeting be recommitted to that committee for further study and for report at the 1954 Annual Meeting.

This resolution was adopted without debate.

Mr. Jenner then offered the third resolution which was as follows:

> RESOLVED, That the American Bar Association disapproves in principle H. R. 344 and H. R. 642 in the 83d Congress, First Session, being respectively, (1) a bill to authorize appointment of circuit judges to serve temporarily as justices of the United States Supreme Court where necessary to provide a quorum, and (2) a bill to require in any case in which the United States Supreme Court "has original jurisdiction no order (other than an order dismissing the case) shall be entered unless approved by at least five members of the Supreme Court." The Standing Committee on Jurisprudence and Law Reform is directed and authorized to oppose passage of said bills in the Congress of the United States by all available means.

The House adopted the resolution as it appears above which includes a change offered from the floor to make it clear that the Association is opposed to the principle of the bills, not just to their phraseology.

In the absence of any spokesman for the Committee on Admiralty and Maritime Law, Secretary Stecher then moved the adoption of the following resolution, which was adopted:

> RESOLVED, That the recommendations made in 1950 and 1952, in support of a bill in aid of the ranking and enforcement and foreclosure of foreign mortgages on foreign flagships in American waters, be renewed and reaffirmed in respect of S. 2407, 83d Congress (Senator Potter and Senator Magnuson), a substantially identical bill for the same purpose; and that the Congress be requested to give careful attention to this bill, which expresses a need of both private and public American capital invested in foreign-flag shipping.

These recommendations had already been approved by the House, and were offered only because the numbers of the bills had been changed when introduced in the current session of the Congress.

E. Smythe Gambrell, of Georgia, Chairman of the Committee on Regional Meetings, gave an oral report, summarizing the history and purposes of the regional meetings.

Cuthbert S. Baldwin, of Louisiana, a member of the Committee on Unauthorized Practice of the Law, made a progress report for that Committee. He said that the Conference Committee on Adjusters, composed of lawyers and representatives of the various insurance and adjusting interests, had unanimously agreed to certain changes in the statement of principles adopted by that group.

John C. Satterfield, of Mississippi, Chairman of the Committee on Amendment to Rule 71-A, made a brief report for that Committee. He said that the bill to restore jury trial in land condemnation cases had passed the Senate and was now before the Judiciary Committee of the House.

Reuben G. Thoreen, of Minnesota, reporting for the Committee on American Citizenship, of which he is a member, gave an oral summary of that Committee's recent work. He mentioned the *Citizenship Bulletins*, now issued semiannually by the Committee, and the Committee's plan to give native-born Americans certificates of citizenship when they reach 21.

John W. Cragun, of the District of Columbia, Chairman of the Section of Administrative Law, reporting for that Section, offered a resolution, saying that it was designed to reiterate the Association's interest in fair and impartial hearing examiners and their independence from agency control.

The House recessed at 12:30 P.M. before acting upon the Section's resolution.

■ At its last session, after lengthy debate, the House voted to endorse statehood for Hawaii, reversing a previous stand that such an endorsement was beyond the scope of the purposes of the Association. The House also adopted two resolutions offered by the Section of Administrative Law.

FOURTH SESSION

■ The House reconvened for the fourth and final session at 1:30 P.M., with Chairman Maxwell presiding. Mr. Cragun continued the report of the Section of Administrative Law. He moved the adoption of the following resolution:

WHEREAS, The American Bar Association believes that the fair and efficient hearing and impartial decision of cases of adjudication before Federal administrative agencies can be achieved only if hearing officers are afforded maximum assurance that they must and can exercise fully independent judgment in hearing and initially deciding cases; and

WHEREAS, the impartial conduct of cases by Federal hearing officers is not adequately safeguarded against agency influences by the regulations and practices which have been evolved under Section 11 of the Administrative Procedure Act; and

WHEREAS, the attainment of the fair hearing and impartial decision objectives of the Administrative Procedure Act requires an unmistakably clear legislative mandate for the independent appointment, tenure and compensation of Federal hearing officers;

NOW, THEREFORE, BE IT RESOLVED, That the American Bar Association advocates the amendment of Section 11 of the Administrative Procedure Act so as to eliminate the authority of the Civil Service Commission with respect to Federal hearing officers and otherwise to achieve the principles and objectives stated in the premises; and

BE IT FURTHER RESOLVED, that the American Bar Association advocates the independent appointment of Federal hearing officers, whether by an independent Office of Federal Administrative Procedure if such an office is created, by Presidential appointment, or by other appropriate means; and

BE IT FURTHER RESOLVED, That the American Bar Association advocates that any amendment of Section 11 of the Administrative Procedure Act to provide for such independent appointment should contain an appropriate grandfather clause; and

BE IT FURTHER RESOLVED, that the American Bar Association advocates that any such amendment of Section 11 of the Administrative Procedure Act should provide also for independence of Federal hearing officer personnel from any agency control impairing the attainment of fair hearing and impartial decision objectives; and

BE IT FURTHER RESOLVED, That the American Bar Association welcomes the contributions presently being made to the solution of these problems by the President's Conference on Administrative Procedure and the Hoover Commission; and

BE IT FURTHER RESOLVED, That the Section of Administrative Law is hereby authorized and directed to represent the American Bar Association before appropriate committees of Congress, as well as before the President's Conference on Administrative Procedure and its committees and the Hoover Commission to the extent that such participation is deemed appropriate in pursuance of the foregoing objectives.

In reply to a question posed by Charles S. Rhyne, of the District of Columbia, Mr. Cragun said that the resolution favored the principle, of S. 1708, now pending before Congress, although it did not carry endorsement of that particular bill.

Mr. Rhyne then said that he was very much in favor of the resolution.

The resolution was adopted without further debate.

Mr. Cragun then proposed the following, which was adopted without debate.

BE IT RESOLVED, that the American Bar Association approves in principle the proposal by the Department of Justice for legislation to make deportation orders subject to review by the courts as soon as such orders are administratively final, so that aliens are not required to wait until they are in custody before challenging such orders in the courts, and authorizes the Section of Administrative Law to appear before the committees of Congress and to take such other steps as it deems appropriate to support the proposal.

Dean Fordham, of Pennsylvania, Chairman of the Committee To Investigate and Report Concerning Associated Insurance Company Advertisements, said that the policy question involved had been decided at the last meeting, so that there was nothing further for the Committee to do. On his motion it was discharged.

Wilber M. Brucker, of Michigan, Chairman of the Committee on Professional Ethics and Grievances, made a short oral report.

The last controversial matter to come before the House at this meeting was a resolution favoring statehood for Hawaii, offered by J. Garner Anthony, of Hawaii, and endorsed by the Committee on Draft to which it had been referred.

Charles S. Rhyne, of the District of Columbia, Chairman of the Committee on Draft, asked Mr. Anthony to explain it to the House. Mr. Anthony made the point that, while the Territory has the qualifications for statehood, it is being taxed without representation.

There was considerable opposition to this resolution, most of the speakers saying they favored statehood for Hawaii, but that the resolution was political and was therefore beyond the purposes of the Association. Paul W. Updegraff, of Oklahoma, raised that question as a point of order.

Chairman Maxwell recalled that that very point of order had been sustained by Chairman Morford when a similar resolution was offered several years ago. He declined to rule on the point, however, since the Constitution of the Association had been amended since Mr. Morford's holding.

Mr. Anthony, Mr. Updegraff, Douglas Hudson, of Kansas, Julius J. Wuerthner, of Montana, H. Cecil Kilpatrick, of the District of Columbia, Fred Roland Allaben, of Michigan, Clifford W. Gardner, of Minnesota, Frank W. Grinnell, of Massachusetts, Arthur VD. Chamberlain, of New York, Whitney North Sey-

mour, of New York, George Brand, of Michigan, William A. Sutherland, of Georgia, Alfred J. Schweppe, of Washington, William N. Bonner, of Texas, and Thomas M. Burgess, of Colorado, all participated in the debate.

Those opposed to sustaining the point of order argued that the addition to Article I of the words "and maintain representative government" of the Association's Constitution had broadened the scope of the purposes of the Association so as to make this resolution germane. On the other hand, it was argued that there was no difference between this resolution and the one offered only the day before by the Mineral Law Section urging sale of certain public lands, yet the latter had been ruled out of order.

The House voted 67 to 38 against sustaining the point of order.

Mr. Updegraff then offered an amendment to the resolution which would have carried endorsement of statehood for Alaska, as well as for Hawaii.

Mr. Seymour, of New York, moved to postpone the entire question until the Annual Meeting. He urged that the question was one of sufficient importance to require further consideration and a public hearing.

Mr. Anthony begged the members of the House to reject Mr. Seymour's motion. The question of statehood for Hawaii is pending before the Congress, he said, and he felt that the view of the House should be expressed. He did not oppose statehood for Alaska, but he pointed out that his resolution was so worded that it could not be rephrased to include Alaska.

The motion to postpone action was defeated 60 to 50.

There was considerable discussion about including Alaska in the resolution, some arguing that there was no reason for endorsing Hawaiian statehood and omitting Alaska, others maintaining that Alaska was not yet ready from an economic viewpoint for statehood.

The House voted down the proposal to include Alaska and then voted to adopt the resolution, which reads as follows:

WHEREAS, Hawaii has had a Constitutional Government for over 100 years; has been an organized territory of the United States for over 50 years; has by every standard demonstrated that it is entitled to admission to the Union as a state; and the further delay of Statehood for Hawaii is a denial of representative government to a loyal and qualified American Community;

NOW THEREFORE BE IT RESOLVED by the AMERICAN BAR ASSOCIATION that it hereby endorses statehood for Hawaii; and

BE IT FURTHER RESOLVED, that a copy of this Resolution be sent to the President of the Senate and the Speaker of the House of Representatives of the Congress of the United States of America.

The Committee on Draft had two other resolutions, both of which proved to be noncontroversial, and they were adopted without debate:

I.

WHEREAS, The President has been authorized to create a special committee to cooperate with the Commissioner of Internal Revenue in connection with a proposed revision of Treasury Department Circular 230, relating to practice before the Treasury.

NOW THEREFORE BE IT RESOLVED, That the American Bar Association recommends that in connection with any such revision, no change in substance should be made of the existing provisions now in said Treasury Department Circular 230 to the effect that the admission of nonlawyers as agents before the Department shall not be deemed to authorize them directly or indirectly to engage in the practice of law.

II.

WHEREAS, The American Bar Association concluded here in Atlanta on March 7 the greatest Regional Meeting in its history, the success thereof being due to the leadership of the ten Southern States which organized and carried out its very excellent and beneficial program through the many committees of the Southern Regional Meeting;

WHEREAS, The Georgia Bar Association, the Atlanta Bar Association, the Lawyers Club of Atlanta, and many members of the Atlanta Bar have been most gracious and kind in providing for the members of the American Bar Association attending the Southern Regional Meeting and this meeting of this House of Delegates that wonderful Southern hospitality for which this section of our nation is world famous:

WHEREAS, Through the wonderful cooperation of our host bar associations this Midyear Meeting of the House of Delegates has been a most successful and outstanding event:

NOW THEREFORE BE IT RESOLVED, That we hereby express our thanks to the bar associations and individuals referred to herein.

William L. Ellis, of the District of Columbia, speaking as the delegate of the Federal Bar Association, urged the members of the House to lend their personal support to the proposals to increase the salaries of federal judges and members of Congress.

The House voted to adjourn sine die at 3:00 P.M.

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